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No. 73-1377

In the Supreme Court of the United States

OCTOBER TERM, 1973

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, AND THE CITY OF DETROIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the courts of appeals (App. A, pp. 1A–34A)[1] is not reported. The opinion of the district court (App. E, pp. 59A–78A) is reported at 358 F. Supp. 669.

[1] Appendix references are to the combined appendix to the petitions in this case and the companion case of *Train* v. *Campaign Clean Water, Inc.*

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 23, 1974 (App. C, pp. 55A–56A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Administrator, acting at the direction of the President, has discretion under the grant program of Title II of the Federal Water Pollution Control Act Amendments of 1972 to control the rate of spending by making allotments to the states under Section 205(a) of less than the full amounts authorized by Section 207.

2. Whether an action to compel allotment is barred by the doctrine of sovereign immunity.

STATUTES INVOLVED

The pertinent portions of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (33 U.S.C. (Supp. II) 1281 *et seq.*) provide:

> *Sec. 205.* (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of

> constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92–50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.
>
> (b)(1) Any sums allotted to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

(2) Any sums which have been obligated under section 203 and which are released by the payment of the final voucher for the project shall be immediately credited to the State to which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immediately available for obligation in the same manner and to the same extent as such last allotment.

* * * * *

Sec. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

STATEMENT

Title II of the Federal Water Pollution Control Act Amendments of 1972 ("the Act") creates a federal grant program by which the federal government undertakes to pay seventy-five percent of the cost of building approved sewage treatment plants. The granting of such funds takes place in several stages. First, the Congress authorizes appropriations for such grants. Then the Administrator makes allotments from the authorized amounts to the states pursuant to specified percentage formulas. The Administrator then obligates for qualified projects within the state out of each state's allotment. Finally, as grantees make expenditures on the approved projects, the sums due under the obligations are appropriated by the Congress and paid.

Sections 205 and 207 of the Act are directly involved in this case. Section 207 authorizes appropriations "not to exceed" $5 billion for fiscal year 1973, $6 billion for fiscal year 1974 and $7 billion for fiscal year 1975. Section 205 provides that the Administrator "shall allot" the sums authorized by Section 207 to the states. The Administrator has construed the statutes as empowering him to control the rate of spending by making allotments of less than the full amounts authorized by Section 207.

On November 28, 1972, the Administrator, acting pursuant to a direction of the President, allotted $2 billion for fiscal year 1973 and $3 billion for fiscal year 1974 (App. A, p. 7A). These actions are challenged in this litigation. On January 15, 1974, the Administrator, in an action not directly challenged here, allotted $4 billion out of the $7 billion authorized for fiscal year 1975.

On December 12, 1972, the City of New York filed a complaint in the United States District Court for the District of Columbia alleging that under Section 205 of the Act the Administrator is required to allot all sums authorized by Section 207—an additional $3 billion for 1973 and $3 billion for 1974. Plaintiff contended that the statutory phrase "shall allot" requires an allotment of the full amount (App. E, p. 60A). The Administrator responded that the phrase, when construed together with Section 207, means "shall allot [an amount] not to exceed" the amount authorized (App. E, p. 71A).

The district court held that the Act imposed a mandatory duty to allot (*id.* at 77A). The court of

appeals affirmed, holding that Section 205(a) imposes a mandatory duty on the Administrator to allot all sums authorized by Section 207 (App. A, p. 34A).[2]

REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals that the Administrator has no discretion to allot to the States less than the total amount authorized to be appropriated under the Act presents an important question that this Court should review. The Administrator has acted to reserve nine of the eighteen billion dollars authorized by the statute for future expenditure. The court of appeals' decision will require that the entire $18 billion be allotted immediately.

Although this case turns on an issue of statutory construction, the issue has important ramifications for the power of the Executive Branch to coordinate and control the federal government's spending process in light of the need for economic stability and the limitations on federal resources. This case is not one in which the Executive asserts a power to control the rate of expenditure in opposition to the wishes of Congress; it is, rather, a case in which courts have improperly cut into and endangered a discretion Congress intended the President to have.

The same issue is pending in cases before the Fifth Circuit (*State of Texas* v. *Train*, Nos. 73–3965 and 73–4026, Administrator's brief filed); the Seventh Circuit (*Anthony R. Martin-Trigona* v. *Train*, No. 73–1794, case briefed, not argued); and the Eighth Circuit (*State of Minnesota* v. *Train*, No. 73–1446, argued *en banc* on February 13, 1974).

[2] The order of the court of appeals has been stayed by that court pending disposition of this petition.

2. Review by this Court at this time is appropriate due to the possibility that allotments once made cannot be withdrawn, even if the Administrator's position is ultimately sustained on the merits, because of the reliance by the states on available allotments in their planning process. The court of appeals explained the extensive legislative history recognizing the Administrator's power to control the rate of spending as control over the rate of spending at the obligation stage of the program (App. A, pp. 19A–25A). The court noted, however, that the nature and scope of any such discretion was not it (App. A, p. 31A, n. 36).

If the order of the court of appeals becomes final, allotments are made, and the power to control the rate of spending at the obligation stage is asserted, further litigation will follow. A court might then hold that the power to control the rate of spending was in fact at the allotment, not the obligation stage, contrary to this decision of the court of appeals. This would then leave the Administrator (assuming that allotments once made cannot be withdrawn) with no power to control the rate of spending at all, even though that other court would also have recognized that there was once such a power.

3. The legislative history shows that Congress intended to give the Administrator the withholding authority he exercised in this case. Congress passed the statute and repassed it over the President's veto after express assurances by those responsible for the legislation that the President would have power under the

statute to control the "rate of spending" by "impoundment." The Conference Committee deleted the word "all" before the word "Sums" from Section 205 (a) and added the phrase "not to exceed" in Section 207. Congressman Harsha, the House floor manager, said: "I want to point out that the elimination of the word 'all' before the word 'sums' in section 205(a) and insertion of the phrase 'not to exceed' in section 207 was intended by the managers of the bill to emphasize the President's flexibility to control the rate of spending." 118 Cong. Rec. H9122 (daily ed., Oct. 4, 1972). The opinion of the court of appeals makes no effort to explain the import of these changes in the bill made by the Conference Committee. Because of these changes, the existence of this discretionary power to control the rate of spending through reduced allotment was conceded by the plaintiffs and accepted by the court of appeals in the companion case of *Campaign Clean Water, Inc.*, v. *Train*, C.A. 4, No. 73–1745 (App. B).

4. Should the allotment of funds be considered to limit the President's discretion over the rate of expenditure, as there is a danger it might, then an action to compel the allotment of authorized funds is barred by the doctrine of sovereign immunity. The defense of sovereign immunity was argued but not urged upon the court of appeals because of the decision of that court in *Scanwell Laboratories, Inc* v. *Shaffer*, 424 F. 2d 859 (C.A.D.C.) (App. A, p. 9A, n. 12).

Although this suit was nominally brought against the Administrator, in reality it is a suit against the sovereign because the requested relief will lead to the

expenditure of government funds. This Court has repeatedly held that sovereign immunity is a bar to actions where the relief sought involved the disposition of the government's own money or property. See, *e.g.*, *Hawaii* v. *Gordon*, 373 U.S. 57; *City of Fresno* v. *California*, 372 U.S. 627; *Dugan* v. *Rank*, 372 U.S. 609; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371.

Land v. *Dollar*, 330 U.S. 731, held that where the judgment sought "would expend itself on the public treasury or domain, or interfere with the public administration," the suit is barred by sovereign immunity. *Id.* at 738. Although allotment does not directly require the expenditure of public funds, its ultimate effect is their expenditure. The decision below affects the ability of the Administrator to control the rate of spending under the program and hence "interfere[s] with the public administration."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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v.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK

CITY OF DETROIT, PARTY PLAINTIFF

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CAMPAIGN CLEAN WATER, INC.

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APPENDIX A

United States Court of Appeals

For the District of Columbia Circuit

No. 73-1705

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK CITY OF DETROIT, (PARTY PLAINTIFF)

v.

RUSSELL E. TRAIN, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

Appeal from the United States District Court for the District of Columbia

Decided January 23, 1974

Before: TAMM, ROBINSON and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge:* This suit was brought as a class action by the City of New York (hereafter, "City") on behalf of itself and all other similarly situated municipalities within the State of New York.

The defendant below was Mr. Russell E. Train, Administrator of the Environmental Protection Agency [1] (hereafter, "The Administrator"). The City of Detroit, Michigan, was granted leave to intervene as party plaintiff. On May 8, 1973, the United States District Court for the District of Columbia granted City's motions for summary judgment and to maintain this lawsuit as a class action, concurrently denying the Administrator's motion to dismiss. The Administrator brings this appeal from the trial court's ruling, and, for the reasons stated *infra,* we affirm.

I. Background

This is but one of a number of cases [2] presently pending across the country concerning allocation of

[1] Russell E. Train, Administrator of the Environmental Protection Agency has been substituted for William Ruckelshaus, the Administrator of the EPA at the time this action was commenced. Rule 43(c)(1), Fed. R. App. Proc.

[2] We provide a list of cases filed as of December 12, 1973:

"Anthony R. Martin-Trigona v. William D. Ruckelshaus, N.D.Ill., Civil Action No. 72-3944;

"Campaign Clean Water, Inc. v. Ruckelshaus, E.D. Va., Civil Action No. 18-73-R, reversed and remanded, Campaign Clean Water, Inc. v. Train, No. 73-1745 (4th Cir., December 10, 1973);

"George E. Brown, Jr. v. Ruckelshaus, C.D. Calif., Civil Action No. 73-154-AAH;

"Herbert C. Klein, et al. v. Ruckelshaus, D.D.C., Civil Action No. 151-73;

"State of Minnesota v. United States Environmental Protection Agency, et al., D. Minn., Civil Action No. 4-73 Civ. 133;

"Mayor Morton Salkind, et al. v. Ruckelshaus, D. N.J., Civil Action No. 2027-72;

"City of Los Angeles v. Ruckelshaus, C.D. Calif., Civil Action No. 73-736-JWC;

"State of Texas v. Fri, W.D. Texas, Civil Action No. A-73-CA-38;

funds under the Federal Water Pollution Act Amendments of 1972 [3] (hereafter, "Act"). In order to place

"State of Maine, et al. v. Robert W. Fri, et al., D. Maine, Civil Action No. 14-51;;"

Letter from National Association of Attorneys General to Impoundment Mailingg List, December 12, 1973; *See also* Appellant's Br. at 2-33.

[3] Pub. Law 92-500, 86 Stat. 816, 33 U.S.C. ch. 26 §§ 1251 *et seq.*

Title I of the actt provides in pertinent part:

"TITLE I—RESEARCH AND RELATED PROGRAMS

"DECLARATION OF GOALS AND POLICY

"Sec. 101. (a) Thee objective of this Act is to restore and maintain the chemmical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

"(1) it is the nationnal goal that the discharge of pollutants into the navigable watters be eliminated by 1985;

"(2) it is the natiional goal that wherever attainable, an interim goal of water qquality which provides for the protection and propagation of fiish, shellfish, and wildlife and provides for recreation in and onn the water be achieved by July 1, 1983;

"(3) it is the natiional policy that the discharge of toxic pollutants in toxic amounts be prohibited;

"(4) it is the nationaal policy that Federal financial assistance be provided to constitruct publicly owned waste treatment works;

"(5) it is the nationaal policy that area-wide waste treatment management planning processes be developed and implemented to assure adequate conntrol of sources of pollutants in each State;

"* * *."

Title II of the Act (§§ 201-212) entitled "Grants for Construction of Treatment Works" provides in pertinent part:

"Allotment

"Sec. 205. (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the Janu-

the instant dispute in its proper context it is necessary to understand the legislative history of the Act. The Act revised the procedures for funding federal aid to local governments for the purpose of the construction of sewage treatment plants. Prior to the Act's passage,

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ary 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92–50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

"(b)(1) Any sums allotted to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

"(2) Any sums which have been obligated under section 203 and which are released by the payment of the final voucher for the

these expenditures were first authorized and then specifically funded by the normal Congressional appropriation process. Due to the nature of this process, local governmental recipients could not ascertain the exact amount they would receive until *after* the formal appropriation. As a result, local governments were

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project shall be immediately credited to the State to which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immeditaely available for obligation in the same manner and to the same extent as such last allotment.

"Reimbursement and Advanced Construction

"Sec. 206.

"* * *.

"(f)(1) In any case where all funds allotted to a State under this title have been obligated under Section 203 of this Act, and there is construction of any treatment works project without the aid of Federal funds and in accordance with all procedures and all requirements applicable to treatment works projects, except those procedures and requirements which limit construction of projects to those constructed with the aid of previously allotted Federal funds, the Administrator, upon his approval of an application made under this subsection therefor, is authorized to pay the Federal share of the cost of construction of such project when additional funds are allotted to the State under this title if prior to the construction of the project the Administrator approves plans, specifications, and estimates therefor in the same manner as other treatment works projects. The Administrator may not approve an application under this subsection unless an authorization is in effect for the future fiscal year for which the application requests payment, which authorization will insure such payment without exceeding the State's expected allotment from such authorization.

"(2) In determining the allotment for any fiscal year under this title, any treatment works project constructed in accordance with this section and without the aid of Federal funds shall not be considered completed until an application under the provisions of this subsection with respect to such project has been approved by the

hesistant to enter construction contracts with only a hope that federal monies would be ultimately passed to them.[4]

The Act was passed to insure that ultimate grantees could rely in advance on the amounts available. Section 101(a) declares that to clean the nation's waters "it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works." To this end, the Act created a funding mechanism known as "contract authority".[5] The technical operation of the sections of the Act relating to this "contract authority" spending is at the heart of this dispute and a thorough understanding of the mechanism is, therefore, imperative.

There are six distinct steps involved in funding under the Act. (1) Authorization by Congress to

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Administrator, or the availability of funds from which this project is eligible for reimbursement has expired, whichever first occurs.

"Authorization

"Sec. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000 and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000."

[4] It appears that there was a substantial gap between the amounts authorized and the amounts appropriated. The Senate Committee on Public Works, in its report on its version of the Act, observed that:

"The lack of adequate funding of grants to assist States and localities in constructing sewage treatment plants is causing critical problems.

"Of the $3.4 billion authorized for this purpose by the 1966 legislation, only $2.2 billion was appropriated. The backlog of projects eligible for Federal payments has reached a total of nearly $2 billion."

S. Rep. No. 92-414, 92nd Cong., 1st Sess. 5 (1971).

[5] *See* S. Rep. No. 92-414 *supra* at 35.

appropriate funds (§ 207); (2) "allotment" of these authorized sums among the various states, pursuant to formula (§ 205); (3) review by the Administrator of project proposals submitted by a particular municipality (§§ 203, 201(g)(2) and 204); (4) "obligation" by the Administrator of the federal share of an approved project (§§ 203 and 201(g)(1)); (5) appropriation by Congress of funds to pay obligated contracts as they fall due; and (6) disbursement of the funds (§ 203 (b) and (c)).

After the Act was enacted into law, over presidential veto,[6] the President wrote to the Administrator, directing him to allot "$2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974."[7] The Administrator followed orders and allocated a total of $5 billion[8] for both fiscal years. It is this final action by the Administrator which has been labeled "Presidential impoundment"[9] and which was successfully challenged in the trial court by plaintiff-appellee City.

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[6] *See* Presidential Veto Message of October 17, 1972, 18 Cong. Rec. S 18534 (daily ed. October 17, 1972).

[7] Letter from the President to Mr. William Ruckelshaus, dated November 22, 1972, J.A. at 15a.

[8] 37 Fed. Reg. 26282 (December 8, 1972).

[9] Not all commentators have agreed on a precise definition of "impounding". *Compare* Boggs, *Executive Impoundment of Congressionally Appropriated Funds*, 24 U. Fla. L. Rev. 221, 222 (1972) *with* Note, *Impoundment of Funds*, 86 Harv. L. Rev. 1505 n.1 (1973) *and* Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 Geo. Wash. L. Rev. 124 (1969). It is true that we are concerned here with the mechanism of contract authorization rather than direct appropriation. We today only decide whether the Act permits withholding of funds at the allotment stage. We will not, therefore, pursue the sematic argument that because of the different funding mechanism that is *not* an "impoundment of funds" but rather a "far

II. The Trial Court's Ruling

Plaintiff-appellee City [10] basically argued below that §§ 205(a) and 207 of the Act, read together, *required* the Administrator to allot among the states the sums of $5 billion and $6 billion in fiscal years 1973 and 1974 respectively. Once allotted, these amounts would then be available for obligation under the Act. By the allotment of only $5 billion total for fiscal year 1973 and 1974, it is argued that the Administrator violated the statute.

The Administrator, defendant-appellant, made several arguments in the trial court. He argued that (1)

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more serious case." *See* Brief of California Attorney General as *Amicus Curiae* at 6. The wisest course to leave the search for the proper definition of "Impoundment" to the legal commentators.

On the subject of impoundment generally, especially the constitutional problems, *see also* Note, *The Likely Law of Executive Impoundment*, 59 Iowa L. Rev. 50 (1973); Comment, *Presidential Impounding of Funds: The Judicial Response*, 40 U. Chi. L. Rev. 328 (1973); Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 Yale L.J. 1636 (1973); Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 43 N.C.L. Rev. 502 (1965); Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 Stan L. Rev. 1240 (1970); Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Prob. 135 (Winter, 1972); Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations*, 57 Geo. L.J. 1159 (1969).

The legal literature contains no detailed analysis of the precise problem *sub judice*. *See* Note, *supra*, 82 Yale L.J. at 1652; Note, *supra*, 59 Iowa L. Rev. at 55 n.42; Note, *supra*, 86 Harv. L. Rev. at 1526 n.116.

[10] The arguments of plaintiff-interventor, City of Detroit, were found by the trial court to be "substantially the same"

the trial court lacked jurisdiction, the suit being barred by the doctrine of Sovereign Immunity; and (2) that the claim failed to present a justiciable case or controversy because (a) it was "hypothetical and premature" and (b) it stated a "political question" thus beyond the jurisdiction of the court. The trial court found against the Administrator on all these arguments,[11] but appellant brings before this court only two issues: (1) whether Sovereign Immunity bars this suit; (2) whether §§ 205(a) and 207 of the Act confer discretion on the Administrator to determine the sum to be alloted under the Act.

III. Sovereign Immunity

It is our opinion that the trial court was correct in holding that City's suit is not barred by the principle of sovereign immunity. Counsel for the Administrator conceded at oral argument that the law of this circuit, *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859, 873 (D.C. Cir. 1970); *Constructores Civiles de Centroamerica* v. *Hannah*, 459 F.2d 1183, 1191 (D.C. Cir. 1972), permits the maintenance of this suit with the Administrator as defendant.[12] In view of this conces-

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as those of plaintiff City, and so all arguments were treated together. City of New York v. Ruckleshaus, Civil Action No. 2466-72 (D.D.C. filed May 8, 1973) J.A. at 53a n.3. We agree and will not differentiate between plaintiff and plaintiff-intervenor.

[11] City of New York, *supra* note 10, J.A. at 56a-63a.

[12] Tape of oral argument November 2, 1973, contains the following colloquy:

"Judge Wilkey: Would you like to elaborate upon the question of sovereign immunty?

"Counsel: As I understand the doctrine of sovereign immunity, as developing a close relationship between the merits and the doctrine. The exception to the doctrine which is claimed to be applicable by the plaintiff here is that the Administrator

sion, we need do no more than state that we hold the suit is not barred. We agree with the reasoning of the

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was essentially acting in violation of the statute, acting outside the scope of his authority, and therefore not acting on behalf of the sovereign but simply as an individual in excess acting outside the law who should be ordered to act within the law. Our contention is that he was acting within the statute, properly exercising his authority, therefore acting on behalf of the sovereign and if we are persuasive on the merits, then we should also win on the doctrine of sovereign immunity. The—Now it may be and I . . .

"Judge: [Inaudible] appreciate any idea of sovereign immunity does it? If you go on that theory the sovereign is no better off than any other citizen.

"Counsel: I think we are getting close to that. There may survive a zone of plausibly legal activities where the government has a kind of special position—a certain deference that a court will find a kind of protection of sovereign immunity reaches somewhat beyond the very strictest construction of the statute. I find the present state of the law in somewhat of a turmoil and I think this circuit has developed a number of new doctrines which throw much of recent law into question, particularly the *Scanwell* case and I don't think the Supreme Court has had the time to sort out the wisdom of that and the impact of that, and I—

"Judge: Are you reserving the sovereign immunity argument for the Supreme Court?

"Counsel: We are reserving the argument for the Supreme Court and we would be delighted, just delighted to prevail on it here.

"Judge: That doesn't leave you much choice in that regard does it?

"Counsel: You mean to reserve it or to—

"Judge: Yes, to reserve it.

"Counsel: Obviously the problem of the position of sovereign immunity is one that impacts not just on this case but many, many cases for the government and we are in a position where we do not win frequently at the moment on the issue of sovereign immunity, but where it is not yet responsible for us not to urge it and hopefully there will be some more authorita-

trial court and here adopt the opinion below on the extent that it treats the Sovereign Immunity question.[13]

IV. The Meaning of §§ 205(a) and 207

We now turn to the analysis which is central to resolution of the matter *sub judice*, *i.e.* the meaning of §§ 205(a) and 207 of the Act which are reproduced in the margin *supra*. Appellee-City relies upon the phrase "shall be allotted" in § 205(a), arguing that by the use of "shall", rather than a word plainly conferring greater discretion (*e.g.* "may"), Congress intended that allotment under the Act be mandatory. The Administrator, on the other hand, asserts that changes in these sections of the Act, prior to its enactment, show a legislative intent to confer discretion upon the Administrator. H.R. 11896, the bill from which §§ 205 and 207 ultimately were derived, was amended in conference. The phrase "not to exceed" was inserted before each specified sum § 207 and the word "all" was deleted from before the phrase "sums authorized to be appropriated" in § 205(a). Appellant argues that these changes indicate that Congress intended to give the Administrator absolute discretion over whether and how much to allot under the Act.

A. *The Overall Intent of the Act*

Initially, it is to be noted that a "plain meaning" analysis will not suffice here. As the Administrator admits "there is no happy marriage between the provisions of the statute . . . ."[14] We agree for we can find no way to harmonize the term "shall allot" and the language concerning sums "not to exceed." Ac-

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tive pronouncements from the Supreme Court within a few years that will clarify where we stand."

[13] City of New York, *supra* note 10, J.A. at 56a-57a.

[14] Appellant's Reply Brief at 2.

cordingly, we turn to an analysis of relevant legislative history to ascertain whether the legislature intended any discretion at the "allotment" stage of the funding mechanism. *The Wilderness Society* v. *Morton,* Nos. 72–1796, 1797, 1798 (D.C. Cir., February 9, 1973 slip op. at 22).

The legislative history is extensive, covering some 1700 pages.[15] Of particular importance are the views expressed by Congressman William Harsha and Senator Edmund Muskie, sponsors of the legislation.[16] The amendments upon which the Administrator relies were authored and sponsored by Congressman Harsha, and are commonly referred to as the "Harsha Amendments."

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[15] "A Legislative History of the Water Pollution Control Act Amendments of 1972," Committee Print, Committee on Public Works, 93rd Cong., 1st Sess., January 1973. Senator Muskie commented on the magnitude of the legislative task:

"I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. The difficulty in reaching agreement on this legislation has been matched only by the gravity of the problems with which it seeks to cope."

118 CONG. REC. S 16869 (daily ed. October 4, 1972).

[16] *See, e.g.*, First National Bank of Logan, Utah v. Walker Bank and Trust Co., 385 U.S. 252, 261 (1966); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394–95 (1951).

Congressman Harsha is the ranking minority member of the House Committee on Public Works which reported H.R. 11896. He was the bill's floor manager and also a member of the conference committee which developed the final language of the Act.

Senator Muskie is chairman of the Senate Subcommittee on Air and Water Pollution which reported S. 2770, the Senate version of the Act. He was floor manager for that bill and a member of the conference committee.

After a careful reading of the relevant legislative materials, we believe that throughout the lengthy legislative process, Congress manifested an intent to *specifically commit* federal funds. It did so in recognition of the necessity of assuring the states that federal aid would be available. The need was recognized in 1971 by the Senate subcommittee considering water pollution:

> At a bare minimum the credibility of the existing federal commitment must be re-established by backing words of authorization with monies of appropriation. Whenever the nation seeks to encourage cities to plan and construct improvements which require many years to complete, the Congress must build reliability into its federal grant incentives. Major facilities cannot be stopped in midstream. A change in federal grant policy to establish a reliable commitment is vital but is not the only change that can and should be made in the federal legislative and regulatory approach to water pollution abatement.

U.S. Senate Committee on Public Works, Water Pollution Control Legislation Hearings, pt. 1, at 521 (1971).

This commitment continued and the subcommittee on Air and Water Pollution concluded in 1972:

> The language of subsection (b) [*sic*] of Section 207 provides that funds authorized for fiscal years 1973, 1974, and 1975, shall be available for obligation by contract upon their allocation to the States. The importance of assured Federal financial support to the achievement of the objectives of this title and to our national purpose of cleaning up polluted waterways cannot be overstated. The task is a massive one in terms of the work to be done and the funds to be expended.

S. Rep. No. 92-414, 92nd Cong., 1st Sess. 35 (1971).

The two principal sponsors of the Act both clearly articulated their belief that federal money must be spent, and, in fact, strongly indicated their recognition that the full $18 billion would be allotted. Senator Muskie stated:

> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion *had to be committed* by the Federal Government in 75 percent grants to municipalities during fiscal years 1973-75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation. . . .
>
> Mr. President, to achieve the deadlines we are talking about in this bill we are going to need the strongest kind of evidence of the Federal Government's commitment to pick up its share of the load. We cannot back down, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill. And the conferees are convinced that *the level of investment that is authorized is the minimum* dose of medicine that will solve the problems we face.

118 *Cong. Rec.* S 16870-71 (daily ed. October 4, 1972) (emphasis added).

It is evident that Congress was concerned with possible inflationary effects. However, it is just as evident that Congress believed that the full $18 billion expenditure was necessary. Senator Cooper[17] stated:

> I believe that the funding levels for these and other provisions of the bill, which total over $24 billion—subject to the usual presidential responsibility for evaluating these needs in relation to other national priorities—are responsible, are consonant with the magnitude of our Nation's water quality problems, and will not have an inflationary effect upon our economy. * * * * * *.
>
> Contract authority is provided for up to $5 billion in 1973, $6 billion in 1974, and $7 billion in 1975. *This will be allocated to the States on the basis of the Environmental Protection Agency's annual assessment of needs established without regard to budgetary limitations and other non-water quality factors.*

[17] Senator Cooper was the ranking minority member of the Senate Committee on Public Works and a floor manager of the bill.

Id. at S 16881 (emphasis added). Senator Bayh also emphasized the necessity of a full Federal commitment:

> The conferees agreed to accept the House passed authorizations for grants to the States for the construction of waste treatment plants, including sewage collection systems. This is construction which is absolutely essential if we are to make any meaningful progress toward the national goals established in the bill. The total authorization for this purpose is $18 billion over the 3 fiscal years ending in 1975. There is *no doubt that this money is needed,* for without substantial authorizations he [*sic*] bill would be little more than a series of empty promises. The amounts allocated for grants for construction of treatment works will be distributed to the States on the basis of need, with the Federal share of construction costs being 75 percent.

Id. at S 16892-93 (emphasis added). Congressman Johnson made clear the intent of the House to spend $18 billion to meet the water pollution problem. In his report to the House, he stated:

> You may recall that the bill that passed this body last March called for authorizing a little more than $24.6 billion, the Senate bill author-

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> ized $20 billion, and the administration requested $6 billion. The conferees have agreed on essentially the same figures as in the House bill, $24.6 billion for the period through fiscal 1975. A total of $18 billion of this sum is for construction grants, and breaks down not to exceed $5 billion for fiscal 1973, $6 billion for fiscal 1974, and $7 billion for fiscal 1975.
>
> Naturally, the large difference in what the administration asked, and what the conference bill provides, raises the question of why the substantial discrepancy?
>
> There is only one answer to that and it is that if we set out to do this job there is *no way we can accomplish it without paying the price.* If we want clean water, we have to pay for clean water. If we want the States and cities to move aggressively ahead in building waste treatment plants they must have Federal aid, and they must have confidence that Washington will continue to live up to its commitments.

Id. at H 9130 (emphasis added).

The President, in his veto message to Congress on October 17, shared this view that the Act would *require* ultimate expenditure of $18 billion for sewage treatment under § 207 of the Act:

> I am compelled to withhold my approval from S. 2770, the Federal Water Pollution Control Act Amendments of 1972—a bill whose laudable intent is outweighed by its unconscionable $24 billion price tag. My proposed legislation, as reflected in my budget, provided sufficient funds to fulfill that same intent in a fiscally responsible manner. Unfortunately the Congress ignored other vital national concerns and broke the budget with this legislation.

118 *Cong. Rec.* S 18534 (daily ed. October 17, 1972).

In the discussion of the Act prior to its being enacted over the veto, Congress again clearly expressed

its intention to pprovide the full $18 billion. Senator Muskie spoke of t the President's concerns:

> But mayy I say to [Senator Scott], when we pass a pieece of legislation like this, with its requirements imposed on industry, with its requirements imposed on the States, with its requirements imposed on the local governments, the questiopn that faces us then is, as we imposed this commititment on them, what commitment are we prepareed to accept on the part of the Federal Goverrnment?
>
> This poiint was well debated in the Senate when we ttook up this bill. I made it clear, the committee made it clear, that what we were asking of thee Congress was a commitment that these peopple in other levels of government and the privatte sector could rely upon. Of course there is a commitment. The President 3 years ago, in his state of the Union message, said he had preempted the environmental issue and that he waas making a commitment.
>
> * * *.
>
> The confiferees spent hours and days studying the problerm of financing the cleanup effort required by this new legislation, and specifically studying hhow much money would be necessary to achieve the objective and goals of the act, as set forth inn section 101(a).

118 *Cong. Rec.* SS 18548 (daily ed. October 17, 1972). Congressman Haarsha responded in a like vein:

> Mr. Speeaker, there is another point which I must raisee. We have known all along that it would takke a massive amount of money and time to reeclaim and to protect our precious water resoources. But, we dare not measure the cost of thisis water bill merely in terms of dollars alone. Wee cannot measure the wealth of our great natuural resources in dollars alone—and if we wait tooo long, all the dollars on earth won't

buy back what we've lost. Under these circumstances, I am firmly convinced that the price of killing this water bill—of sustaining this Presidential veto—is far, far too costly.

* * *.

Furthermore, the President maintained that a vote to override the veto of the Water Pollution Control Act Amendments of 1972 was a vote to increase the likelihood of higher taxes. So be it, the public is prepared to pay for it. *To say we can't afford this sum of money is to say we can't afford to support life on earth.*

* * *.

Mr. Speaker, this is perhaps the most important environmental legislation the Congress has yet enacted. The question is not, *"Can we afford to spend $18 billion over the next 3 years for waste treatment plants?" but "Can we afford not to?"*

118 *Cong. Rec.* H 10268–69 (daily ed. October 18, 1972) (emphasis added).

The cardinal principle of interpretation is "to give effect to the intent of Congress." *United States* v. *American Trucking Assn's,* 310 U.S. 534, 542 (1940). We have included these extensive excerpts at this point because we find them in a clear expression of legislative will. We find that it was Congress' intention that the full $18 billion be spent to control water pollution. Had the statute been clearly drawn, this would end our inquiry, if in fact one need ever have begun. Unfortunately, we must still confront the problem of the Administrator's arguable discretion to allot or not allot. We do so in the belief that the legislative history, as quoted above, manifests an intent to create a procedure which would insure that the total authorized funds would be made available to the states. It is this goal which must guide us in interpreting the funding mechanism, for if discretion in allotment would make the achievement of this goal more difficult, it must be assumed that Congress intended no such authorization. *See, e.g., United States* v. *Congress of Industrial Organizations,* 335 U.S. 106, 112 (1948); *Vermilya-Brown Co., Inc.* v. *Connell,* 335 U.S. 377, 388 (1948).

B. THE MEANING OF THE HARSHA AMENDMENTS

We now turn to the analysis of §§ 205(a) and 207, particularly with regard to the effect of the Harsha Amendments. As we indicated earlier, it is important to keep in mind the distinct stages involved in the contract-grant mechanism. Appellant-Administrator argues, primarily from the Harsha Amendments, that the Act permits discretion at the *allotment* phase. Appellee-City counters that while the Administrator might control the timing of future spending through delay of *obligation,* he must fully allot. We agree with Appellee because, after careful consideration of the relevant history, we find it clear that the Congressional intent, both before and after the Harsha amendments, was to make allotment mandatory.

Section 205(a), by its terms, supports the Appellee. It is mandatory in tone: "Sums authorized to be appropriated pursuant to section 207 for each fiscal year . . . *shall be allotted* by the Administrator. . . ." (Emphasis added.)

The Appellant argues that the Harsha Amendments, by adding "not to exceed" in § 207, manifest an intent to make the *allotment* (under § 205) discretionary. However, the imposition of a ceiling on authorized appropriations is not inconsistent with the Appellees' position concerning mandatory allotment. Logically, it could be interpreted to mean that the

amount obligated (later appropriated and expended) in any fiscal year *may* be less than the maximum amount authorized. We concede that the elimination of the word "all" from § 205(a) is a source of confusion. At least one court [18] has chosen to rely entirely upon this syntatical change, although there is no precise explanation of its meaning. We consider it more useful to examine the statements of sponsors purporting to explain the intended effect of the Harsha Amendments; we find that allotment remained mandatory.

Perhaps the clearest statement in the Congressional history is that of Senator Muskie in explaining the purpose behind the Harsha Amendments:

> In our last conference, the able and distinguished ranking minority member of the House Committee on Public Works offered two amendments which he indicated would reduce opposition to the bill from the White House and the Office of Management and Budget. These two amendments were accepted by your conferees and by other House conferees in order to remove the question of a veto on the basis of the money authorized by the legislation.
>
> Under the amendments proposed by Congressman WILLIAM HARSHA and others, the authorizations for obligational authority are "not to exceed" $18 billion over the next 3 years. Also, "all" sums authorized to be obligated need not be committed, *though they must be allocated*. These two provisions were suggested to give the administration some flexibility concerning the obligation of construction grant funds.
>
> The conferees do not expect these provisions to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the act. At the same time, there may be instances in which the obligation of funds to a particular project in a particular State may be contrary to other public policies such as the National Environmental Policy Act. In these cases the conferees would, of course, expect the administration to refuse to enter into contracts for construction.

118 *Cong. Rec.* S 16871 (daily ed. October 4, 1972) (emphasis added). Senator Muskie stated clearly that allotment [19] under the Act is to be mandatory.

Congressman Harsha, in explaining the meaning of his amendments, stressed that flexibility with regard to obligation was their purpose:

> Furthermore, I want to point out that the elimination of the word "all" before the word "sums" in section 205(a) and the insertion of the phrase "not to exceed" in section 207 was intended by the managers of the bill to *emphasize the President's flexibility to control the rate of spending.*

Id. at H 9122 (emphasis added). It is our belief that Congressman Harsha, by emphasizing that the President could "control the rate of spending," was clearly referring to control at the obligation stage. Had the amendments been designed to confer discretion at the allotment stage, Congressman Harsha could have so stated; furthermore the Congressman had clearly intended to obligate the entire $18 billion to meet the pollution problem [20] and his views as to the amend-

[18] Campaign Clean Water v. Ruckleshaus, Civil No. 18-73-R (E.D. Va. filed June 5, 1973) slip op. at 14.

[19] Senator Muskie's use of the term "allocate" vice the term "allot" is of no import. The Senate version of the bill had used the term "allocate." Appellants concede this point. *See* Brief for Appellant at 14.

[20] *See* Congressman Harsha's remarks at 118 Cong. Rec. H10268-69 appearing *supra* at 18.

ments must be read in light of his expressions of the total legislative intent.

The Harsha Amendments were further analyzed in a discussion among Congressmen Ford, Harsha, and Jones.[21]

> MR. GERALD R. FORD. Mr. Speaker . . . I think it is vitally important that the intent and purpose of section 207 is spelled out in the legislative history here in the discussion on this conference report.
>
> As I understand the comments of the gentleman from Ohio [Harsha], the inclusion of the words in section 207 in three instances of "not to exceed" indicates that is a limitation. More importantly that it is not a mandatory requirement that in 1 year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*
>
> Mr. HARSHA. I do not see how reasonable minds could come to any other conclusion that *the language means we can obligate or expend up to that sum*—anything up to that sum but not to exceed that amount. * * *
>
> MR. GERALD R. FORD. Mr. Speaker, I would like to ask the distinguished chairman of the subcommittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio (Mr. Harsha).
>
> MR. JONES of Alabama. . . . My answer is "yes." Not only do I agree with him, but the gentleman from Ohio offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio (Mr. Harsha).

[21] Congressman Jones was Chairman of the House conferees and a floor manager for the bill.

> MR. GERALD R. FORD. Mr. Speaker, this clarifies and certainly ought to wipe away any doubts anyone has. *The language is not a mandatory requirement for full obligation and expenditure up to the authorization figure in each of the 3 fiscal years.*

Id. at H 9123 (emphases added).

From these statements, we draw the conclusion that the amendments were intended to grant the executive discretion in the *obligation* phase, not in the allotment phase. The President evinced a similar understanding in his veto message:

> Certain provisions of [the bill] confer *a measure of spending discretion and flexibility* upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.
>
> But the law would still exact an unfair and unnecessary price from the public. For I am convinced . . . that the pressure for full funding under this bill would be so intense that funds approaching the *maximum authorized* amount could ultimately be claimed and paid out, no matter what technical controls the bill appears to grant the Executive.

118 *Cong. Rec.* at S 18534–35 (daily ed. October 17, 1972) (emphases added). It is true that the President's statements concerning the Act are not to be given the weight accorded to statements by member of Congress. Nevertheless, it appears to have been the President's understanding that § 205 and § 207 conferred upon the Administrator only "spending discretion and flexibility." He evidently felt that since the sums had to be allotted and made available for obligation, public pressure could force him to obligate the funds.

After the veto, both Senator Muskie and Congressman Harsha again explained the effect of the amendments upon the allotment phase. Senator Muskie repeated his position that the Administrator must allot the sums authorized.[22] Congressman Harsha reiterated his explanation of the amendments to the House, stating:

118 Cong. Rec. S 18547 (daily ed. October 17, 1972).

> Furthermore, Mr. Speaker, we have emphasized over and over again that if Federal spending must be curtailed, and if such spending cuts must affect water pollution control authorizations, the administration can impound the money.

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[22] *See* 118 Cong. Rec. at S 18546, S 18549 (daily ed. October 17, 1972). Senator Muskie illustrated his specific understanding that all funds would be alloted by introducing a table of proposed expenditures premised entirely on *full allotment*. His remarks:

"With respect to the budget impact, let me give the Senate just one more factor to be included in the Record, a table showing the expenditures projected under this bill. I ask unanimous consent that it be included in the Record at this point.

"There being no objection, the table was ordered to be printed in the Record, as follows:

"Rate of expenditures by fiscal years under authorizations of S. 2770[a]

"[In billions]

	Fiscal year—			
	1973	1974	1975	Total
Fiscal year:				
1973	$0.25			$0.25
1974	1.00	$0.30		1.30
1975	1.50	1.20	$0.35	3.05
1976	2.00	1.80	1.40	5.20
1977	.25	2.40	2.10	4.75
1978		.30	2.80	3.10
1979			.35	.35
Total	5.00	6.00	7.00	18.00

"[a] 1st year, 5 percent of authorization; 2d year, 20 percent of authorization; 3d year, 30 percent of authorization; 4th year, 40 percent of authorization; 5th year, 5 percent of authorization."
"[b] Fiscal year 1973, $5,000,000,000; fiscal year 1974, $6,000,000,000; fiscal year 1975, $7,000,000,000."

> I want to point out that the elimination of the word "all" before the word "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207 was intended to emphasize the President's flexibility *to control the rate of spending.*
>
> * * *.
>
> Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. *This is the pacing item in the expenditures of funds.* It is clearly the understanding of the managers that under these circumstances the *Executive can control the rate of expenditures.*

118 *Cong. Rec.* H 10268 (daily ed. October 18, 1972) (emphases added). Congressman Harsha then explained the impact of the Act in future fiscal years:

> [T]he first major impact of obligations from the *$5 billion authorizations* for the fiscal year ending June 30, 1973, is in fiscal year 1975.
>
> * * *.
>
> As a matter of fact, for fiscal year 1973 *if all the money were obligated and placed under contract,* there would only be $20 million needed to meet the obligations. . . .

Id. (emphases added). It seems clear that Congressman Harsha's hypothetical concerning the *obligation* of the entire $5 billion requires an underlying assumption that all such sums *must be allotted* and thus available for obligation.

C. THE ADMINISTRATOR'S ARGUMENTS

At this point we turn to an analysis of the Administrator's arguments. We note that basically the Administrator argues an uncontested point, i.e. that the Ad-

ministrator has control over the "rate of spending."[23] Indeed, as we have observed *supra,* the appellee agrees and there is much legislative history to support this view.[24] The Administrator then argues that such conceded control over the "rate of spending" must mean control at the allotment stage. We disagree. In view of the seriousness of the question, we shall set forth the Administrator's various arguments fully.

First, the Administrator argues, Congressman Harsha, after explaining that the effect of the amendments would be to "emphasize the President's flexibility to control the rate of spending",[25] went on to state his belief that the President could "control expenditures" under the Act by the "same means" (commonly called "impoundment") as he controlled expenditures under the Federal-Aid Highways Act,[26] 23 U.S.C. §§ 101 *et seq.* (1970). By this, the Administrator argues, Congressman Harsha meant that "impoundment" includes a reduction in "allotments," as well as in "obligation." Therefore, it is argued, he intended to indicate that discretion would be available at the

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[23] We note, for example, that the caption of the Administrator's discussion of legislative history reads:

"C. *The Legislative History of Sections 205 and 207 Makes it Clear that Congress Understood that they were Designed to Confer Control Over the Rate of Spending on the Administrator.*"

Appellant's Br. at 11.

[24] *See, e.g.,* remarks of Congressman Harsha at 118 Cong. Rec. H 9122 (daily ed. October 4, 1972) reproduced fully *supra.*

[25] *Id.*

[26] "Furthermore, let me point out, the Committee on Public Works is acutely aware that moneys from the highway trust fund have been *impounded* by the Executive. Expenditures from the highway trust fund are made in accordance with similar contract authority provisions to those in this bill. Obviously expenditures and appropriations in the water pollution control bill could also be controlled. However, there is even more flexibility in this water pollution control bill because we have added 'not to exceed' in section 207, as I indicated before.

"Surely, if the administration *can impound moneys* from the highway trust fund which does not have the flexibility of the language of the water pollution control bill, it can just *as rightly control expenditures from the contract authority produced in (t)his legislation by that same means.*"

118 Cong. Rec. H 9122 (daily ed. October 17, 1972) (emphases added). *See also* 118 Cong. Rec. H 10268 (daily ed. October 18, 1972).

allotment stage. (Appellant's Brief at 11–12). We cannot agree. As the Administrator concedes, the statement reproduced in the margin *supra* at note 26 "present[s] some difficulty in interpretation" (Appellant's Br. at 12) because "impoundment" under the Federal-Aid Highways Act is achieved only by the limiting of contracts awarded (*i.e.* obligation). There is no possibility under that Act to reduce at the "allotment stage."[27] Whatever Congressman Harsha intended to explain, the two acts operate differently, and we believe that he could not have been arguing by analogy to discretion not conferred by the Highway Act. Congressman Harsha was referring to the obligation stage and not to allotment.[28]

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[27] Called "apportionment" in the Highway Act. *See* 23 U.S.C. § 104 (1970).

[28] We note that it is unclear whether Congressman Harsha was aware of the district court decision in State Highway Commission of Missouri v. Volpe, 347 F. Supp. 950 (W.D. Mo. 1972), *aff'd,* 479 F. 2d 1099 (8th Cir., 1973). If he had an understanding of that decision which did not allow impounding *at the obligation stage,* he would have known that the Highway Act, with its different mechanisms, could not be an analog to the Act here. We point this out only to say that while we endeavor to read his words as he spoke them, there was, in fact, a court decision then in existence which had fully and carefully analyzed the Highway Act.

Next the Administrator attempts to explain the seemingly clear remarks of Senator Muskie that the Administrator must allot the full amounts authorized in section 207. The Administrator argues that the Senator's statement "'must be allocated' . . . seems to contradict the changes in sections 205(a) and 207, which relate only to allotment." (Appellant's Br. at 14.) We find this statement, appearing without explanation, meaningless. Senator Muskie was, by his own words, *explaining* to the Senate what the amendments meant. His words do not contradict anything at all; rather they seem to be a straightforward explanation of those amendments.

Next, the Administrator argues that Senator Muskie's remarks giving examples of instances where obligation may be controlled[29] amount to a "non-example". (Appellant's Br. 14.) We do not comprehend this argument. Senator Muskie gave as an example the situation where the obligation of funds for a particular project may be contrary to "other public policies such as the National Environmental Policy Act," and thus monies would be properly withheld. The Administrator apparently feels that, since there exists elsewhere in the Act a power[30] in the Administrator to disapprove projects which do not comply with NEPA, Senator Muskie could not have been

[29] "The conferees do not expect these provisions to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the Act. At the same time, there may be instances in which the obligation of funds to a particular project in a particular State may be contrary to other public policies such as the National Environmental Policy Act. In these cases the conferees would, of course, expect the Administration to refuse to enter into contracts for construction."

[30] *See* § 203 of the Act.

speaking of control of rate of spending. To the contrary, we consider this a proper illustration of the stage at which Congress intended executive control, *i.e.* at the *obligation* stage. The Senator's example supports this, and we understand it as such.
118 Cong. Rec. S 16871 (daily ed. October 4, 1972).

The Administrator alleges that Senator Muskie made a "serious error" in a colloquy with Senator Dominick during post-veto discussion of the Act.[31] The appellant claims that the Senator's statement that "there is plenty of flexibility in this bill for . . . the Congress to control spending" is at odds with the fact

[31] "Mr. Dominick. Is my understanding correct that the amount authorized here is still subject to the appropriation process?

"Mr. Muskie. Funds are made available through contract authority which is subject to the control of the President and also the Committee on Appropriations. Yes. As a matter of fact, may I say to the Senator that the conferees adopted an amendment proposed by Congressman Harsha to indicate clearly the intent of Congress with respect to that point.

"Mr. Dominick. And so the Committee on Appropriations could by its action determine what contract authority the President would have. Is that correct?

"Mr. Muskie. Under the amendments proposed by Congressman William Harsha and others, the authorizations for obligational authority are 'not to exceed' $18 billion over the next 3 years. Also, 'all' sums authorized to be obligated need not be committed, though they must be allocated. These two provisions were submitted to give the administration some flexibility concerning the obligation of construction grant funds.

"Mr. Cooper. Mr. President, will the Senator yield briefly? I would like to be sure we are clear on this matter.

"Mr. Muskie. I yield.

"Mr. Cooper. Did I understand the question of the Senator from Colorado to be whether the Appropriations Committee could set a limit on the amount to be obligated?

"Mr. Dominick. That is the question I asked. I understood from the Senator from Maine that the answer was in the

not contested, that the statute does not permit "the Committee on Appropriations itself to set a limit on the amount committed under the statute."[32] Appellant argues, *sub silentio*, that Senator Muskie's basic understanding of the funding mechanism is apparently not to be trusted, and therefore, his numerous statements as to mandatory allotment are not to be credited. We find no such "serious error." In stating that the Appropriations Committee may "anticipate" the amount of contract authority under the Act, we agree with appellee that Senator Muskie was apparently doing no more than stating that the Appropriations Committee could report out a particular appropriations bill which would operate prospectively to limit the Administrator's authority to obligate amounts less than previously allotted. Such a mechanism has been recognized by the Senate Appropriations Committee in at least one context.[33] In any event, we are satisfied that Senator Muskie knew what he meant

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affirmative; that the Appropriations Committee could set that limit.

"Mr. Cooper. I thank the Senator. Out of this $24 billion $6 billion is not subject to contract obligation. Is that correct?

"Mr. Muskie. The Senator is correct. Mr. President, may I say in addition to the Senator from Colorado the amount of contract authority may be anticipated by the Appropriations Committee. That is, years in the future up to 1975 the Committee on Appropriations may set amounts which the administration may obligate in advance. So there is plenty of flexibility in this bill for the President and the Congress to control spending.

"Mr. Dominick. I thank the Senator for clarifying the record."

118 Cong. Rec. S 18546 (daily ed. October 17, 1972).

[32] Appellee's Br. at 28; Appellant's Br. at 17.

[33] *See* Senate Committe on Appropriations, Department of Transportation and Related Agencies Appropriations, S. Rep. No. 92-271, 92nd Cong., 1st Sess. 25-6 (1971).

when, in the *same dialogue* with Senator Dominick, he reiterated his understanding that "'all' sums authorized to be obligated need not be committed, though they must be allocated."

The Administrator next contends that the trial court's finding that Congress intended control over the rate of "obligation and expenditure" and not over allotments[34] must be erroneous because he asserts, "in terms of the impact on potential recipients control over allotments [*sic*] and control over obligations would have the same effect." (Appellant's Br. at 21.) We disagree emphatically. Discretion over allotments necessarily confers discretion over the amount *available to be spent* and thus grants the executive the power to contravene the oft-stated legislative purpose to make federal money available. Could the Administrator allot $0? Happily, this is not the case, but the Administrator suggests no limit on his alleged discretion not to allot. Such authority would be greater than the power to control the rate of expenditures to which the sponsors repeatedly referred. Further, discretionary allotment would not be consonant with the overall concern, clearly expressed,[35] of providing a total of $18 billion to combat water pollution. We find that discretion in obligation is distinctly different than discretion in allotment, and that it was only the former which this legislation was intended to confer.[36]

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[34] City of New York v. Ruckleshaus, *supra* n.10, J.A. at 66a.

[35] *See, e.g.*, text at 12-19 *supra*.

[36] Of course, it could be argued that discretion at any stage could contravene the basic purpose of the Act, *i.e.* to provide $18 billion to meet the pollution problem. We express no opinion as to whether or what extent the Administrator could legally withhold funds at the obligation stage; that question must await future resolution. *Compare* Georgia v. Nixon, No. 63, Original, *motion denied*, 42 U.S.L.W. 3193 (U.S. October 9, 1973). *See* n.39 *infra*.

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Finally, the Administrator makes an argument to this court not made to the trial court. He does so apparently in response to the trial court's findings and reasoning with regard to § 205(b)(1) of the Act, the "reallotment" provisions. The trial court's statement of the perceived effect of § 205(b)(1) is reproduced in the margin.[37] The Administrator contends that the trial court erred in its assumption that reduced allotments have the effect of irrevocably denying state authorization while reduced obligation does not because, it is contended, allotments can be "augmented". (Appellant's Br. at 21.) We think that this is but another vehicle for a now familiar argument, *i.e.* that "allotment" control is identical with "obligation" control. Therefore, appellant concludes, a construction such as ours, which considers them separately must be erroneous.

We need not and do not reach the merits of this contention concerning "augmentation". The trial

[37] Another feature of the Act which is of some importance in the resolution of issues before the Court is the reallotment provision in § 205(b)(1) of the Act. Once allotted to a State, sums are available for obligation for approved projects there 'for a period of one year after the close of the fiscal year for which such sums are authorized.' If for any reason the sums allotted are not fully obligated within that period, they are to be reallotted 'generally on the basis of the ratio used in making the last allotment of sums under this section.' Such reallotment sums remain available for obligation and are added to the State's allotment for the next fiscal year. Any sums authorized but not allotted at the appropriate time are lost to the State under the provisions of this Act. Thus, by refusing to allot the full sums authorized, the Administrator controls the absolute amount (as opposed to the rate) of spending without regard to the standards set forth in, e.g., § 204, for determining whether sums should be obligated.
New York City v. Ruckleshaus, *supra* n. 10, J.A. at 55a.

court's reasoning appears to us to be correct.[38] As to the contention of the Administrator, we further observe that the Act nowhere mentions any type of later augmentation procedure, and rather states in section 205(a) that *"the* allotment for fiscal year 1973 shall be made not later than . . . ." (Emphasis added.) However, believing as we do that there is a clear distinction under the Act between allotment and obligation and that there can be *no discretion* as to the former, we find it unnecessary to consider whether an allotment could be "augmented" in a later fiscal year; full allotment must be made in each fiscal year.

D. SECTION 206(f)(1)

Having considered the contentions of the Administrator as to the proper meaning of sections 205 and 207, we turn to yet another consideration which we find strongly supportive of our decision. It is elementary that a statute must be construed, if it is possible, to give effect to *all of the provisions. E.g., United States* v. *Menasche,* 348 U.S. 528, 538–39 (1955). Section 206(f)(1) of the Act allows the Administrator to obligate funds for a particular state's project even if the funds allotted to that state have been fully obligated. This is possible provided that "an authorization is in effect for the future fiscal year for which the application requests payment, which authorization will insure such payment without *exceeding the State's expected allotment from such authorization."* (Emphasis added.) Section 206(f)(1) would have scant operative effect if the "state's expected

[38] *Accord,* Campaign Clean Water v. Ruckleshaus, Civil No. 18-73-R (E.D. Va. filed June 5, 1973) slip op. at 8, *reversed on other grounds,* Campaign Clean Water v. Ruckleshaus, —— F.2d ——, No. 73-1745 (4th Cir. December 10, 1973).

allotment" could not be known because the Administrator had discretion to allot only a portion of such authorization. This is further evidence of a legislative purpose to make allotment mandatory. In keeping with the basic principal of statutory construction represented in *Menasche*, we can see no other way to preserve the force of § 206(f)(1), save mandatory allotment.

V. Conclusion

The *only* question [39] before this court is whether the Administrator must make full allotments under the Act. Our reading of the revelant statutory language and careful analysis of the pertinent legislative history compells us to hold that § 205(a) of the Act requires the Administrator to allot the full sums authorized to be appropriated in § 207; [40] therefore, the decision of the trial court is

Affirmed.

[39] There is no constitutional question in this case. Both sides have agreed that if this court determines that the Act requires full allotment there remains no constitutional power in the executive to limit the allotments because, in the words of appellant, "Allotment . . . is not an act that of itself commits the government to any obligation." (Appellant's Reply Br. to Supplemental Br. of Appellee at 2.) *See also* Supplemental Br. of Appellee at 3–6. *Compare* Georgia v. Nixon, et al., No. 63, Original, *motion denied*, 42 U.S.L.W. 3193 (U.S. October 9, 1973) which attempted to raise the question of the constitutionality of refusal to *obligate*.

[40] $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974.

APPENDIX B

United States Court of Appeals for the Fourth Circuit

No. 73–1745

Campaign Clean Water, Inc., appellee

v.

Russell E. Train, Administrator, Environmental Protection Agency, appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge

(Argued October 2, 1973—Decided December 10, 1973)

Before Haynsworth, *Chief Judge*, Russell and Field, *Circuit Judges*.

Russell, *Circuit Judge:*

Like a number of other pending actions,[1] this suit, brought by an environmental group concerned with

[1] *See, City of New York* v. *Ruckelshaus* (D.C. N.Y. 1973) 358 F. Supp. 669; *Brown* v. *Ruckelshaus and City of Los Angeles* v. *Ruckelshaus* (D.C.C.D. Cal. 1973) —— F. Supp.

water quality in Virginia, involves the discretionary power, if any, of the defendant Administrator, Environmental Protection Agency, to allot appropriation authority for fiscal 1973 and 1974, particularly as those allotments relate to Virgina, under the provisions of Section 205 of the Federal Water Pollution Control Act Amendments of 1972.[2] The Act sets forth a comprehensive legislative program for controlling and abating water pollution.[3] In Subchapter II of that Act, provision is made for federal financial assistance to states and localities in planning and constructing sewage treatment plants, designed to assist in assuring the prompt attainment of specified standards of water quality.[4] Under Section 207 of that Subchapter,[5] grant authorizations [6] are made "for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, * * *." The grant authorizations in Section 207 are supplemented by Section 205 which provides for the allotment by the Administrator of such authorizations as approved among the States

——— (decided 8/17/73); *Martin-Trigona* v. *Ruckelshaus* (D.C.N.D. Ill. 1973) ——— F. Supp ——— (decided June 28, 1973); *Minnesota* v. *USEPA* (D. Minn. 1973) ——— F. Supp. ———, (decided June 25, 1973).

[2] Section 1285, 33 U.S.C.

[3] Section 1251, *et seq.*, 33 U.S.C. The legislative history is set forth in U.S. Code Cong. & Adm. News, 92d Cong., 2d Sess., pp. 3668, *et seq.*

[4] Section 1281, *et seq.*, 33 U.S.C.

[5] Section 1287, 33 U.S.C.

[6] The statutes involved in this action concern not direct appropriations but what has often been described as "obligational authority". The Office of Management and Budget, in its listing of appropriated funds withheld from disbursement, omitted those represented by "obligational authority". *See*, *New*

on a statutorily stated formula "not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after October 18, 1972."

On November 22, 1972, the President wrote the Administrator directing the latter not to "allot among the States the maximum amounts provided by section 207"; specifically, he directed that, "[N]o more than $2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974 should be allotted." In directing such action, the President referred to the fact that the Act "permits a significant increase over our programs to fund the construction of wastewater treatment facilities" and stated that budget requests for funding such construction under the earlier programs in fiscal 1973 amounted to "$2 billion". In fixing the allotments to be made under Section 205, the President observed that, "[T]hese amounts will pro-

York Times, Feb. 6, 1973, at 1, col. 1 (city ed.). In principle, however, the difference between the two is unimportant, so far as the issues in this proceeding are concerned. As one commentator has aptly remarked, "Appropriations are passed in various forms, and permit actual expenditures as well as the incurring of obligations. However, there is another species of financial authority, the contract authorization [also termed obligational authority], which empowers the governmental unit only to incur obligations. Under such contract authority power, the agency will have to later request an appropriation to liquidate the obligations it has incurred." Note, *The Likely Law of Executive Impoundment*, 59 *Iowa L. Rev.* 50, 54 (1973). There is thus no reason to treat the two forms of authorizations other than as appropriations and to adjudge the right of the executive to withhold the same in both instances. *See*, Note, *Impoundment of Funds*, 86 *Harv. L. Rev.* 1505, 1506, n. 2 (1973).

vide for improving water quality and yet give proper recognition to competing national priorities for our tax dollars, the resources now available for this program and the projected condition of the Federal treasury under existing tax laws and the statutory limit on the national debt."

The plaintiff brought this action for both declaratory and injunctive relief in connection with the administration of the Act. By way of declaratory relief, it asked judgment that "(a) the defendant [Administrator] lacks the discretion to refuse to allott among the states the full sums authorized by Congress; or, alternatively, (b) the defendant abused whatever limited discretion he possesses by withholding a greater amount of funds than contemplated by the Congress under the Act." It, also, requested injunctive relief, "directing the defendant to allot among the states the full sums of $5 billion and $6 billion authorized to be appropriated by section 207 of the Act for fiscal years 1973 and 1974." Without answering, the defendant Administrator moved to dismiss on the grounds "that the Court lacks jurisdiction over the subject matter of this suit and that the Complaint fails to state a claim upon which relief can be granted." At the same time, the plaintiff moved for summary judgment "on the grounds that there is no genuine issue as to any material fact and that, * * * plaintiff is entitled to judgment as a matter of law." After a hearing, the District Court denied the motion of the defendant to dismiss and granted in part the motion of the plaintiff for summary judgment.[7] From that decision, the defendant Administrator appeals. We remand for further proceedings.

[7] The decision of the District Court is reported in 361 F. Supp. 689.

I.

The defendant Administrator at the outset raised a number of procedural barriers to the maintenance of this action. It put in issue the standing of the plaintiff to maintain this action, the justiciability of the issues, the prematureness of the proceedings, and finally, the bar of sovereign immunity. These claims were carefully considered in the thoughtful opinion of the District Court and were found meritless. For the reasons assigned by the District Court and for the reasons hereafter developed, we agree.

II.

Turning to the substantive controversy: The plaintiff concedes the Congress intended to give the executive certain discretion in making allotments under Section 205; the defendant Administrator asserts the existence of such discretion; and the District Court found that there was such discretion.[8] The existence

[8] Thus the plaintiff in its brief, states the issues on appeal to be "whether, in passing the Federal Water Pollution Control Act Amendments of 1972, Congress intended to give the President boundless discretion to withhold funding under the Act, or whether, as plaintiffs contend and the district court held, the discretion granted the Executive is limited and was grossly exceeded."

While a number of courts have found a want of discretion in the Administrator in fixing the authorized allotments, the commentators on the Act are not as definite in their opinions. *See*, for instance, Note, *The Likely Law of Impoundment*, 59 *Iowa L. Rev.* 50, 55, n. 42 (1973) and Note, *Impoundment*, 86 *Harv. L. Rev.* 1505, 1526, n. 116; but *cf.*, Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 *Yale L. J.* 1636, 1952. The issue of discretion, it is conceded by one of the commentators is plainly "arguable", something that cannot be said, it suggests, with reference to the appropriation made in

of discretion, therefore, is not in issue on this appeal. The point of controversy is the extent of that discretion and the power of the Court to review. The plaintiff, in the District Court, contended that the discretion granted by Congress to the Administrator was not "unbridled"; that specifically it was not broad enough "to give the Administrator the discretion to gut the Act."

In developing this contention, it emphasized the purposes and goals of the Act and argued that the Administrator's discretion may not be exercised in a man-

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support of the Federal Aid Highway Act, Section 101-44, 23 U.S.C., involved in *State Highway Commission v. Volpe* (8th Cir. 1973) 479 F.2d 1099, 50 *Iowa L. Rev.* at p. 55. In fact, Congress made it as plain as it could in the Highway Act that it intended to confer no right of impoundment on the executive. (*See* Page 1111, 479 F.2d.)

Ralph Nader, in his testimony before the Senate Ad Hoc Committee on Impoundments (hereafter referred to as *Impoundment Hearings*) ranged himself with those who found discretion in the executive in executing Section 205. He testified in this connection:

"Granted, the legislative history of these 1972 amendments suggests that Congress may have intended to grant the President limited discretion in controlling the level of obligations. However, the decisive overriding of the veto indicated a clear congressional mandate to have sufficient funds immediately available for obligation to meet the timetable for water quality goals which the act established." (at 34)

For a thoughtful statement of reasons for discretionary spending authority in the executive, *see* Fisher, *Presidential Spending Discretion and Congressional Controls*, appearing in the Winter, 1972, issue of *Law and Contemporary Problems* and quoted in *Impoundment Hearings*, at 719:

"The reform advocate is therefore advised to regard executive spending discretion as an essential, ineradicable feature of the budget process. Expenditures deviate from appropriations for a number of reasons. Appropriations are made many months, and sometimes years, in advance of expenditures.

ner and to an extent that the purposes of the Act are frustrated and nullified and that Courts have both the power and the duty to prevent such nullification. The defendant, on the other hand, took the position that, while the Administrator had not by his limited allotments frustrated the legislative purposes reflected in the Act, he has absolute discretion in making such allotments, and that his exercise of discretion is immune from judicial review. In resolving these conflicting positions, the District Court found that, on its face, an "impoundment policy,[9] by which 55% of the

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Congress acts with imperfect knowledge in trying to legislate in fields that are highly technical and constantly undergoing change.

"New circumstances will develop to make obsolete and mistaken the decisions reached by Congress at the appropriation stage. It is not practicable for Congress to adjust to these new developments by passing large numbers of supplemental appropriation bills. Were Congress to control expenditures by confining administrators to narrow statutory details it would perhaps protect its power of the purse but it would not protect the purse itself. Discretion is needed for the sound management of public funds."

But, *cf.*, the comment of the editor in 82 *Yale L.J.* 1636, at p. 1640, n. 26:

"It is important to note that this argument at its strongest only establishes a limited kind of impoundment power for the Executive, the power to impound when conditions intrinsic to the program indicate that further spending would be wasteful. There is no principle that would indicate that the President must necessarily have all impoundment powers or none at all."

[9] The term "impoundment" has provoked some disagreement. The editor in one recent Note would define it "as the executive practice of withholding appropriated funds or obligational authority, beyond the bounds of any statutorily conferred discretion." Note, 59 *Iowa L. Rev.* 50, 56 (1973). Similarly, Professor Miller defines it as "deliberate attempts to scuttle projects authorized by Congress, but disliked by the Executive."

allocated funds will be withheld, is a violation of the spirit, intent and letter of the Act and a flagrant abuse of executive discretion." [10] It found authority to declare judgment "that that policy is null and void".[11] Though it thus found the allotments as fixed by the Administrator invalid, it denied injunctive relief on the ground the Court was not equipped to "supervise the Administrator in the administration of the Act", partially because of "the expert discretion designed for the appropriations stage." [12] And, finally, it limited the application of its judgment "to those interests in Virginia represented by the plaintiff organization." [13]

As we have already stated, the right of the defendant to exercise discretion in making the allotment under Section 205 is not challenged by this appeal: that right is conceded. We are not concerned with the

Impoundment Hearings, at 752. This would limit the application of the term to those acts of the Executive which represent an illegal withholding of appropriated funds. Other authorities use the term to identify any executive withholding of appropriated funds and make no effort to engage in the "semantic" game. Thus, in the Note, *Impoundment of Funds*, 86 *Harv. L. Rev.* 1505, n. 1, impoundment is defined as a "refusal by the executive, for whatever reason, to spend funds made available by Congress." Another writer uses similar language, stating that, "In its broadest context, impoundment occurs whenever the President spends less than Congress appropriates for a given period." Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 *Geo. Wash. L. Rev.* 124 (1969). This would seem the more sensible definition. Under this definition, any withholding would be an impoundment and whether such impoundment was permissible would depend on the legislative intent.

[10] 361 F.Supp. at 700.

[11] 361 F.Supp. at 700.

[12] 361 F. Supp. at 700.

[13] 361 F. Supp. at 701.

question whether an appropriation, either by its very nature [14] or under the terms of the Antideficiency Act,[15] even in the absence of any expressed grant of executive discretion in its use, involves some element of discretion in the executive. We are dealing here with a legislative provision which it has been held (and from this holding there is no appeal) does vest the executive with discretion. In short, the issues on this appeal are whether, accepting the holding that there was discretion in this case, its exercise is judicially reviewable, and, if reviewable, what standards or criteria are to be used in assessing the validity of its exercise. Those are the only issues posed by the appeal.

It is the defendant's position that, by conceding executive discretion in the fixing of the allotments under Section 205, the plaintiff has admitted a want of judicial power to review his exercise of that dis-

[14] It has been sometimes stated that an appropriation is "*permissive* rather than *mandatory*", by which the author states "it is meant that the Executive Branch is *authorized* but not *required* to spend funds up to a given amount for designated purposes." (Italics in text.) Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 42 *N.C. L. Rev.* 502, 511 (1965). In somewhat similar vein, Professor Corwin summed the matter up with the statement that the Constitution "assumes any expenditure is primarily an executive function, and conversely that the participation of the legislative branch is essentially for the purpose simply of setting bounds to executive discretion—a theory confirmed by early practice under the Constitution." Corwin, *The President: Office and Powers*, 127–8 (4 ed. 1957).

See, also, McKay v. Central Electric Power Cooperative (D.C. Cir. 1955) 223 F.2d 623, 625.

[15] Section 665, 31 U.S.C. This section authorizes the executive to withhold funds "to provide for contingencies, or to effect savings whenever *savings* are made possible by or through changes in requirements, greater efficiency of operations, or *other developments* subsequent to the date on which such appro-

cretion. He rests this argument upon Section 10 of the Administrative Procedure Act,[16] which provides that administrative action, the exercise of which is "committed to agency discretion" is not judicially reviewable. *Cf.,* Davis, *Administrative Law Treatise,* 1970 Supp., § 28.16, p. 964. What the defendant urges is similar to the administrator's argument in *Overseas Media Corporation v. McNamara* (D.C. Cir. 1967) 385 F.2d 308, 316, n. 14, *i.e.,* that we should "adopt the view that the [legislative] act of committing a matter to an agency's discretion forecloses court consideration of an alleged abuse of that discretion"

priation was made available" (Italics added, 665(c)(2).) Two constructions of the terms "savings" and "other developments" have been advanced. Under a narrow view, these terms relate to "developments within the individual programs involved, and that impoundment is only permissible to the extent that it does not interfere with achieving the underlying purposes of the program involved." Note, *Impoundment,* 86 *Harv. L. Rev.* at p. 1517 (1973). "According to a more expansive view, however, 'other developments' should refer to any subsequent development, whether or not uniquely program related, which would, in the administrator's mind, call for the making of savings through reduced program expenditure. A determination that a subsequent situation of inflation justified program reduction or termination in order to cut government spending would fit into this category." Note, *The Likely Law of Executive Impoundment,* 59 *Iowa L. Rev.* 50, 67 (1973). Most commentators, however, lean to the narrow view. *See* 86 *Harv. L. Rev.* 1517; 59 *Iowa L. Rev.* 67; 82 *Yale L. J.* 1642.

Mr. Fisher in an article quoted in the *Impoundment Hearings,* p. 399, takes this narrow view of the application of the Act. In support he quotes from the language of House Appropriations Committee in reporting the Act:

"It is perfectly justifiable and proper for all possible economies to be effected and savings to be made. But there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds."

[16] Section 701, 5 U.S.C.

under any circumstances. To that argument, the Court in *Overseas* replied firmly, "The Legislative history of the Administrative Procedure Act belies this position."[17] And this conclusion in *Overseas* was confirmed in *Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S. 402, 410, where, speaking of this exception, the Court characterized it as "a very narrow exception", whose application, according to "[T]he legislative history of the Administrative Procedure Act" is limited to "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" In resolving whether the matter falls within that "rare" instance in which the executive action is non-reviewable, the problem is "that of determining when the agency action is 'committed to agency discretion' within the meaning of section 10 of the Administrative Procedure Act, and when it merely 'involves' discretion which is nevertheless reviewable." *Ferry v. Udall* (9th Cir. 1964) 336 F.2d 706, 711, *cert. denied* 381 U.S. 904. Unquestionably, whether an agency, in exercising its asserted discretionary power under a legislative authorization, is acting in a manner consistent with the legislative purpose and with proper regard for the constitutional principle of separation of powers between the executive and legislative is an issue that Section 10 did not intend to make non-reviewable; it patently is not an issue "committed to agency discretion". *See,* Note, *Protecting the Fisc: Executive Impoundment and Congressional Power,* 82 *Yale L. J.* 1636, at p. 1647; *DeVito v. Shultz* (D.C. Cir. 1969) 309 F. Supp. 381, 383; *Hamel v. Nelson* (D.C. Cal. 1963) 226 F. Supp. 96, 98. The power to spend rests

[17] 385 F. 2d at 316, 317, n. 14.

primarily with Congress under the Constitution;[18] the executive, on the other hand, has the constitutional duty to execute the law in accordance with the legislative purpose so expressed.[19] When the executive exercises its responsibility under appropriation legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals,[20] the executive trespasses beyond the range of its legal discretion and presents

[18] Article I, Section 9, Clause 7, Constitution.

[19] Article II, Section 3, Constitution.

See, also, Spaulding v. Douglas Aircraft Co. (D.C. Cal. 1945) 60 F. Supp. 985, 988, aff. 154 F. 2d 419:

"The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same."

[20] See statement of then Assistant Attorney General Rehnquist, quoted in the Impoundment Hearings, at 609:

" 'It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them.' *Memorandum Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools* (Dec. 1, 1969), reprinted in *Impoundment Hearings* at 279, 283."

It may be said, too, that, by absolutely refusing to spend or obligate funds appropriated by Congress, the executive is for all practical purposes exercising an "item veto", terminating or delaying a particular program, thereby avoiding the embarrassment of a public veto message with the risk of a Congressional overriding.

an issue of constitutional dimensions which is obviously open to judicial review. And it was this issue and this issue alone to which the District Court carefully restricted itself in this case. It specifically denied any power on its part to review or supervise the defendant's discretion so far as it was exercised in a manner that was not so arbitrary or drastic as to represent a nullification of legislative purpose.[21] We agree generally with this construction of its power by the District Court.[22]

Our only difficulty with the decision of the District Court relates to its conclusion on the issue of arbitrary frustration of legislative policy by the executive action taken. The District Court found that an allotment under Section 205 in the amount of

[21] *Cf., Housing Auth., San Francisco v. United States Dept., H.U.D.* (D.C. Cal. 1972) 340 F. Supp. 654, 656; Church, *The Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 *Stan. L. Rev.* 1240, 1252 (1970); Boggs, *Executive Impoundment of Congressionally Appropriated Funds*, 24 *U. of Fla. L. Rev.* 221, 228 (1972); and Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations*, 57 *Geo. L.J.* 1159, 1201 (1969); and Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 43 *N.C.L. Rev.* 502, 536 (1965).

The court's power is well stated in 82 *Yale L.J.* at p. 1651:

"The court need not seek to derive some lower figure but need simply test the contested impoundment against the legislative intent as expressed in the act to determine whether the impoundment was an abuse of discretion. It will derive its own construction of the statute then test the administrative action to see whether it could rationally be a carrying out of the Act's mandate."

[22] Of course, in the exercise of his discretion, the Administrator may not consider factors that are irrelevant to the legislative intent. *Overton Park, supra* (401 U.S. at 416).

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55% of the authorization under Section 207, established such a drastic and arbitrary administrative reduction in the contract authorization as, on its face, without any other evidentiary support, to require a finding of executive nullification of the purposes of the Act. With this factual finding, we are unable to agree. The statement of the President must be read in conjunction with the explanation given by the Administrator both in his presentation to this Court and in his Congressional appearances, for his allotments as made. In his presentation to this Court, the Administrator has disclaimed any purpose of evading the responsibilities given him under the Act. In his appearance before the Senate *ad hoc* Subcommittee on Impoundment of Funds on February 6, 1973,[23] where he defended the allotments made for the years in question here, he forcefully expressed his commitment to the goals intended by the Act[24] and affirmed that the reductions in the contract authorizations, as represented by the allotments made by him under Section 205 for fiscal years 1973 and 1974, were arrived at on the basis of an administrative judgment that greater authorizations could not be spent "in a wise or expeditious manner"[25] in achieving such goals during those years.

This judgment was based, in turn, he testified, on a conclusion that "there was not sufficient technical capacity, technical capability, I think it was, or contractual capacity" to carry out a greater or more extensive program.[26] In reaching that conclusion, he had taken note, according to his testimony, that there

[23] *Impoundment Hearings*, at 403, *et seq.*
[24] *Ibid*, p. 405.
[25] *Ibid*, p. 413.
[26] *Ibid*, p. 416.

were already available other contract authorizations for the same purposes as that authorized under the Act, which, when added to the authorizations actually allotted by the Administrator, meant that "there was $7.25 billion released on the 27th of November [1973] to be spent over the next 18 months" in meeting the goals of the program.[27] He argued that to attempt a more rapid rate of spending would inordinately inflate the cost of the program without appreciably accelerating the attainment of its goals. He pointed out in partial confirmation of this opinion that "the construction industry has inflated the cost of the building of the project at the rate of 120 percent", while at the same time "the cost of living has gone up at the rate of 40 percent."[28]

[27] *Ibid*, p. 416.
[28] *Ibid*, pp. 416–417.

In connection with this latter statement of the Administrator, it may be observed that one of the disputed issues in some of the controversies over executive impoundments concerns whether there is legislative warrant under the particular legislation for the executive to consider the need to thwart general inflationary tendencies in the economy in determining a withholding of appropriations. The claimed basis for the exercise of such power is stated by the Department of Justice in its reply to certain questions propounded by the Chairman in the *Impoundment Hearings*, pp. 837–8. It is not clear whether this issue is present here. It is possible to interpret the testimony of the Administrator as indicating that it was the unique, inflationary forces prevalent at the moment in that part of the construction industry involved in sewage plant development which were considered by him. Actually, however, the general objection to impoundment on the part of the Congress seems to be directed at the re-ordering of priorities as a result of impoundment. Thus, the Chairman of the Subcommittee at the *Impoundment Hearings*, Senator Erwin, after quoting from Mr. Fisher to the effect that, "Impoundment is not being used to avoid deficiencies, or to effect savings, or even to fight inflation, but rather to shift the

The Administrator, also, asserted in his brief, without contradiction by the plaintiff, that as of August 31, 1973, all of the States had utilized but 73 percent of their 1973 allotments and 8 percent of their 1974 allotments. There is no way for us at this juncture to venture an opinion whether the Administrator had been "dragging his feet" in approving projects or whether these figures indicate that the allotments made represented reasonable goals for the two fiscal years in controversy. The experience in the use of the allotments so far in fiscal 1973 and 1974 is, though, a matter that might well be considered in determining whether the Administrator, in exercising his discretion under Section 205, acted so arbitrarily as to frustrate the attainment of the legislative goals.

Moreover, it must not be overlooked that the Administrator claims the power to increase allotments during a fiscal year and has declared in this Court that, should it appear that the allotments made for fiscal years 1973 and 1974 are not sufficient to support the applications made and qualifying under the standards established, he will give consideration to making additional allotments out of the maximum authorizations provided by Section 207.[29]

The Act itself grants contract authorizations for the fiscal years 1973– 1974– 1975 in the overall amount of $18 billion. It provides for reallotment of unused allotments. The defendant asserts that, considered as a whole, the Act gives the defendant the power to add to allotments for any fiscal year, within, of course, the

scale of priorities from one Administrator to the next, prior to Congressional action," said, "That is our complaint." *Impoundment Hearings*, p. 277.

[29] This procedure, if followed, it could be argued, would carry out the Congressional intent.

legislative maximums, as the need demonstrates. Because he claims there has been no denial of any qualified project in either fiscal year 1973 or fiscal year 1974, there is no demonstrable need for an increase in the allotments heretofore made. Moreover, he avers without contradiction by the plaintiff that no qualified project for the Commonwealth of Virginia has been denied contract authorization during fiscal 1973 or 1974. He goes further and asserts that if there are qualifying projects from Virginia in the fiscal years in question that exceed the allotments already made, the plaintiff has suffered no prejudice or injury unless he [the Administrator] refuses to make additional allotments to cover qualifying projects in Virginia in the two fiscal years in question.

It is true, as the plaintiff argues, that Section 205 declares that allotments are to be made no "later than the January 1st immediately preceding the beginning of the fiscal year for which authorized" but the defendant presses the point that this provision simply establishes a date for initial allotments and was not intended and does not represent a restriction on the defendant's right, if the need develops, to add to or to increase the allotments as initially made.[30] Whether this construction is sound—and we are strongly persuaded that it is—it would seem unlikely that any party would have standing successfully to challenge any increase made by the Administrator in the initial allotment. In any event, this is an issue that should be given consideration in determining whether the action of the Administrator was arbitrary.

These observations do not establish that the District Court's conclusion was incorrect; they do indicate, though, that the issue in controversy here is not one

[30] *See*, *Impoundment Hearings*, pp. 840–1.

to be resolved by any *per se* rule but is one that requires inquiry into the basis for the Administrator's action. After all, there is a presumption of legality that attaches ordinarily to an administrator's action and the burden of establishing impropriety rests on him who challenges. Even if the District Court had concluded, as some other courts have, that the Administrator was without discretion in making allotments under Section 205, he would still have been empowered under the terms of the Antideficiency Act "to withhold funds for reasons of efficiency and economy"; and, if the plaintiff wished to challenge an impounding of funds made under the authorization of the Antideficiency Act, it would have had the burden of showing "that the impoundment was in fact not warranted by efficiencies or other new developments", and *pari passu,* it would seem to follow that "a plaintiff challenging an assertion that the executive has discretion to impound under a particular spending bill must show that the discretion granted was less than that claimed". Note, *Impoundment of Funds,* 86 Harv. L. Rev. 1505, 1529 (1973).

Beyond the bare assumption that an expenditure of approximately half the authorized appropriation establishes a frustration of legislative purpose the plaintiff has done nothing to satisfy its burden. Such an assumption, in the face of other circumstances to which we have adverted, and recognizing that the District Court has found at least some discretion in the Administrator to fix the allotment, is insufficient to support the conclusion reached by the District Court that the allotments made were "a violation of the spirit, intent and letter of the Act and a flagrant abuse

of executive discretion", or involved a use of irrelevant factors in arriving at his action. That issue should not have been resolved on the pleadings but a record should have been made that would support the conclusion reached by the District Court.[31] We accordingly remand to the District Court for further proceeding in order to determine, on the basis of such evidence as may be submitted by the parties, whether as a fact the amount of allotments made by the Administrator under Section 205 were "a violation of the spirit, intent and letter of the Act and a flagrant abuse of executive discretion", or involved irrelevant or improper standards in fixing such amount. In connection with that inquiry, it will be appropriate for the District Court to consider whether the factors used by the defendant in fixing the allotments were the ones that were "relevant" under a proper construction of the discretionary power found to exist in the executive.[32]

REMANDED WITH DIRECTIONS

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[31] *Cf., State of Minnesota v. United States Environmental Protection Agency* (D.C. Minn. 1973) — F. Supp. — (decided June 25, 1973), in which the plaintiff, complaining, as the plaintiff does here, that the allotments were improper as they applied to it, offered in affidavit form, proof that projects in its state had qualified for grant but were being denied approval because of the paucity of the allotment.

[32] *See, Citizens to Preserve Overton Park v. Volpe, supra,* at 420 (401 U.S.).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1705

SEPTEMBER TERM, 1973—CIVIL ACTION 2466-72

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK CITY OF DETROIT, (PARTY PLAINTIFF)

v.

RUSSELL E. TRAIN, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

Appeal from the United States District Court for the District of Columbia

Before: TAMM, ROBINSON and WILKEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment ---------- of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam—For the Court:

HUGH E. KLINE,
Clerk.

Date: January 23, 1974.

Opinion for the Court filed by *Circuit Judge* TAMM.

APPENDIX D

United States Court of Appeals for the Fourth Circuit

No. 73-1745

CAMPAIGN CLEAN WATER, INC., APPELLEE

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

JUDGEMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the case is remanded to the United States District Court for the Eastern District of Virginia, at Richmond for further pro-

ceedings consistent with the opinion of this Court filed herewith.

Filed December 10, 1973.

WILLIAM K. SLATE, II,
Clerk.

A True Copy, Testes.

WILLIAM K. SLATE, II,
Clerk.

VIRGINIA LIPFORD,
Deputy Clerk.

APPENDIX E

THE CITY OF NEW YORK, ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES, PLAINTIFF,
THE CITY OF DETROIT, PLAINTIFF-INTERVENOR

v.

WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANT

Civ. A. No. 2466–72

United States District Court, District of Columbia,
May 8, 1973

GASCH, *District Judge:*

This is an action for a declaratory judgment and mandamus to compel the defendant, William D. Ruckelshaus, until recently Administrator of the United States Environmental Protection Agency ("the Administrator") to comply with the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (hereafter termed "the Act").[1] Plaintiff is

[1] This action was originally brought against William D. Ruckelshaus, who was serving as Administrator at that time. During the pendency of the action, Mr. Ruckelshaus resigned and his successor has not yet been appointed and confirmed. By operation of Rule 25(d), Fed. R.Civ.P., the Acting Administrator is automatically substituted as the defendant. The action

the City of New York, suing on behalf of itself and all similarly situated municipalities within the State of New York. The City of Detroit has been granted leave to intervene as a party plaintiff seeking the same relief. The action is brought pursuant to § 505(e) of the Act and 5 U.S.C. §§ 701–706; jurisdiction is alleged on the grounds of 28 U.S.C. §§ 1331, 1332, and 1361.

Plaintiff and plaintiff-intervenor allege that § 205 (a), taken together with § 207, of the Act requires the Administrator to allot among the states the sums of $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974, thereby making such sums available for obligation on sewage treatment works construction approved by the Administrator for federal funding. It is further alleged that the Administrator has violated this statutory requirement by promulgating, at the express direction of the President of the United States, a regulation, effective December 8, 1972,[2] which allotted among the states for fiscal years 1973 and 1974 "sums not to exceed $2 billion and $3 billion respectively." The case is now before the Court on plaintiff's motion to determine that this suit may be maintained as a class action, defendant's motion to dismiss, and the motions of plaintiff and plaintiff-

continues unabated unless the new Administrator comes forward with evidence showing such a discontinuance of his predecessors' policy as to make the action moot. *See* Rule 25(d), 1961 Notes of the Advisory Committee on Rules; 3B J. Moore, Federal Practice, ¶ 25.09[3], at 25–402 (2d ed. 1969). Since no such showing has been made in the instant case, the actions of Mr. Ruckelshaus are chargeable to the Acting Administrator for purposes of this action, and the Court's order is binding upon the Acting Administrator and his successors in office.

[2] 37 Fed.Reg. 26282, § 35,910-1(a) 1972.

intervenor for summary judgment.[3] Also before the Court for consideration are the pleadings, oppositions, affidavits, and argument by counsel in open Court.

The Court's characterization and analysis of the issues in the case will be clearer if the mechanism set up under the Act for funding the construction of sewage treatment works is briefly outlined. The Act reverses the normal procedure whereby sums are appropriated by Congress and thereafter contractually obligated by the appropriate agency. Instead, Congress has, in § 207, authorized certain specific sums to be appropriated to carry out the purposes of Title II of the Act, Grants for Construction of Treatment Works. The Administrator is required by § 205 to allot the sums among the states according to a time schedule and needs formula set up under the Act.[4] (Whether the full sums authorized to be appropriated must be allotted or only a portion of them—the size of the portion being within the Administrator's discretion—is the central issue disputed by the parties.) Once allotted, the sums become available for obligation, i.e., contract authority exists up to those amounts. The Ad-

[3] The contentions of the plaintiff-intervenor are substantially the same as those made by the plaintiff. In the interest of brevity, references throughout will be solely to the plaintiff unless the context requires otherwise.

[4] According to § 205(a) sums are to be allotted among the States "in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States." Congress has supplied the figures for determining the ratios to be used for the fiscal years ending June 30, 1973, and June 30, 1974. (Table III of House Public Works Committee Print No. 92-50). For subsequent fiscal years, the allotments are to be made in accordance with a revised cost estimate submitted by the Administrator to Congress and "approved by law specifically enacted hereafter."

ministrator reviews grant applications submitted by States and municipalities for federal funding of particular waste treatment projects to determine whether they satisfy criteria set forth in the Act, e.g., in § 204. Once the Administrator approves the plans, specifications, and estimates for a project, a contractual obligation arises to pay the federal share allocable to that project.[5] Funds are then appropriated to liquidate the obligations as they fall due; the final step, actual disbursement of the funds, is then made. It is clear from this sequence that *allotment* is not tantamount to *expenditure* or even commitment of the funds.

Another feature of the Act which is of some importance in the resolution of issues before the Court is the reallotment provision in § 205(b)(1) of the Act. Once allotted to a State, sums are available for obligation for approved projects there "for a period of one year after the close of the fiscal year for which such sums are authorized." If for any reason the sums allotted are not fully obligated within that period, they are to be reallotted "generally on the basis of the ratio used in making the last allotment of sums under this section." Such reallotted sums remain available for obligation and are added to the State's allotment for the next fiscal year. Any sums authorized but not allotted at the appropriate time are lost to the State under the provisions of this Act. Thus, by refusing to allot the full sums authorized, the Administrator controls the absolute amount (as opposed to the rate) of spending without regard to the standards set forth in, e.g., § 204, for determining whether sums should be obligated.

[5] Section 202(a) sets the federal share of the cost of construction of projects, as approved by the Administrator, at 75 percent. Section 203 of the Act specifies that the Administrator's approval creates contractual obligations on the part of the United States.

Having set forth the framework of the Act within which the dispute now before the Court has arisen, the Court will proceed to the issues. First to be dealt with are jurisdictional issues raised in the defendant's motion to dismiss and his opposition to plaintiff's motion for summary judgment. Defendant contends that this Court lacks the requisite jurisdiction because the doctrine of sovereign immunity bars the suit and because the action fails to present a justiciable case or controversy. The Court does not agree with these contentions and will deal with them only briefly.[6]

Two well-settled common law exceptions to the doctrine of sovereign immunity are set forth in two cases cited by defendant, Dugan v. Rank, 372 U.S. 609, 621–622, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), and Larson v. Domestic & Foreign Commerce Corporation, 337 U.S. 682, 689–690, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); and plaintiff's action falls squarely within the exception covering suits challenging actions by federal officers which go beyond the scope of their statutory powers. Defendant is not aided by the general rule set forth in Land v. Dollar, 330 U.S. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947), to the effect that where the judgment sought "would expend itself on the public treasury or domain, or interfere with the public administration," the suit is in reality brought against the sovereign; for as subsequent dis-

[6] It should be noted that these same contentions were made recently in motions to dismiss by the defendant in three consolidated civil actions before Judge Jones of this Court. Local 2677, American Federation of Government Employees v. Phillips, 358 F.Supp. 60 (D.D.C., 1973). In those suits, as in the instant case, plaintiffs were challenging the actions of a federal officer on the ground that they were in violation of his statutory authority; Judge Jones rejected the defendant's contentions and proceeded to the merits of the case.

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cussion will reveal, the relief sought by plaintiff in this action does not require the *expenditure* of unappropriated public funds (or indeed of any public funds at all), nor will it interfere with the lawful exercise of defendant's discretionary powers under the Act.

A second reason for rejecting the sovereign immunity defense as a bar to this action is the fact that plaintiff is seeking review in part on the basis of the Administrative Procedure Act, 5 U.S.C. §§ 701–706; the rule in this Circuit is that the A.P.A. constitutes a waiver of sovereign immunity in actions to which it applies. Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App.D.C. 371, 385, 424 F.2d 859, 873 (1970); Constructores Civiles de Centroamerica, S.A. v. Hannah, 148 U.S.App.D.C. 159, 459 F.2d 1183 (1972). Defendant has sought to distinguish *Scanwell* by contending that there was no question there of any "disposition" of government funds, whereas the instant case presents a "demand" for such funds. As already indicated, this argument must fail because defendant has misconstrued the nature of the relief sought. Plaintiff is demanding only that funds be *allotted* as, in its view, Congress required.

Defendant contends that this action fails, for two reasons, to present a justiciable case or controversy. First it is argued that the action is hypothetical and premature and hence does not fall within the limits of federal court jurisdiction as defined by Article III of the Constitution. It is true that Article III confines federal courts to the adjudication of cases and controversies and forbids the rendering of advisory opinions. Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). Where a declaratory judgment is sought, the plaintiff must show a "substantial controversy between parties having adverse legal in-

terests of sufficient immediacy and reality" to warrant its issuance. Maryland Casualty Company v. Pacific Coal & Oil Company, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). Defendant contends that because plaintiff has no guarantee that projects for which it seeks funding under the Act will be approved, refusal to allot, and thus make available for obligation, the full amounts authorized to be appropriated in § 207 of the Act does not amount to action that is adverse to any real or immediate interests of plaintiff. This argument fails on several grounds. Plaintiff has filed an affidavit of the Commissioner of the Department of Water Resources for the City of New York averring that the City has received approval from the United States Environmental Protection Agency (EPA) for two waste treatment projects, and that because of the reduced allotments, plaintiff's share of available federal funds "will permit only a token start toward completion." (Affidavit of Martin Lang dated April 3, 1973, ¶¶5–6).[7] Defendant has not disputed these assertions of fact.

Even were plaintiff's grant application still under study, however, there would be more than a merely speculative injury; for as affidavits filed by both plaintiff and plaintiff-intervenor indicate, the reduction in allotments has resulted in serious planning delays that will necessarily retard the development of sewage treatment facilities. (Affidavit of Martin Lang, dated February 8, 1973, ¶11; affidavit of Gerald Remus, dated March 15, 1973, ¶12). The seriousness of the planning problem was understood by Congress. It was

[7] Attached as Exhibit "B" to the affidavit is a copy of a letter dated March 1, 1973, from Gerald M. Hansler, Regional Administrator, EPA, announcing approval of the plaintiff's grant application for the two projects.

one of the reasons for utilizing the device of allotment, thereby making funds available for obligations, in lieu of the ordinary appropriations procedure.

Congressman William Harsha, one of the managers of the bill, observed during debate on a proposed amendment to H.R. 11896[8] which would have substituted the normal appropriations process for the allotment mechanism that "it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants, including the sale of bonds that they have to sometimes negotiate." 118 Cong. Rec. H2727 (daily ed. March 29, 1972). When there is uncertainty concerning how much will be allotted in a given year, municipalities cannot properly plan the scale of projects for which to seek federal funding.

Still another way in which plaintiff is injured by the Administrator's refusal to allot the full amount of the sums authorized to be appropriated by § 207 lies in the permanent loss of funds not allotted at the appropriate time. Such funds can not thereafter be made available for obligation even if grant applications which, in the Administrator's determination, meet all the requirements of the Act are submitted and the current allocations are insufficient to pay the authorized federal share.

Considering all of the ways in which plaintiff's interests are imminently threatened by the Administrator's action under challenge here, it seems clear that there exists an injury sufficiently concrete to create a real controversy in which plaintiff has a

[8] H.R. 11896 was the House version of the bill later enacted as P.L. 92-500, 86 Stat. 816, the provisions of which are disputed in the instant case.

genuine stake; and in ruling on the legality of the Administrator's action alleged to be the cause of this injury, the Court is not rendering a mere advisory opinion.

Defendant's other ground for urging the Court to find the subject matter of this action nonjusticiable is the contention that the matter at issue is a "political question" which the Court is barred from considering by reason of the doctrine of separation of powers. Certainly it is true that this Court could not decide a case if it presented a political question. Powell v. McCormack, 395 U.S. 486, 518, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972, 88 L.Ed. 1385 (1939). Criteria to be used in determining whether a political question is presented have been set forth by the Supreme Court in Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). There Mr. Justice Brennan, writing for the majority, declared:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The Administrator contends that at least two of the considerations listed by Mr. Justice Brennan are

applicable to the instant case, namely, (1) something "very close" to a "textually demonstrable" commitment of power to control spending in the grant of executive power in Article II of the Constitution; and (2) a "lack of judicially discoverable and manageable standards for resolving" the question whether particular expenditures should be made. Even assuming *arguendo* that the Constitution gives to the President and his subordinates unreviewable authority to determine whether particular expenditures authorized by Congress should be made at a particular time, it is clear that the instant case presents none of the problems cited by the defendant. Counsel's position on this point must fail simply because he has not correctly characterized the issue before the Court. The Court is not being called on to determine whether the Administrator should *spend* any given amount of money for sewage treatment works. Rather the Court is being asked by plaintiff to require the Administrator to perform what it alleges to be a purely ministerial duty under the Act, that of allotting—and thus making *available for obligation*—the sums authorized to be appropriated in Section 207 of the Act.[9] There is no "textually demonstrable constitutional commitment" of this responsibility to the executive branch, and there is no difficulty in discovering standards for resolving the issue before the Court. Either the Administrator

[9] For this reason the instant case is distinguishable from Housing Authority of San Francisco v. U.S. Department of Housing and Urban Development, 340 F. Supp. 654 (N.D. Cal.1972), cited by the Administrator. In *Housing Authority* the Court found the issue presented to be nonjusticiable because it found in the statute in question a legislative "intention of allowing spending discretion in the executive" and no manageable standards for determining whether the discretion had been abused. 340 F.Supp. at 656.

is required by the Act to allot the full amount of the sums authorized to be appropriated in § 207 or he is not so bound.

The Court is not overstepping its authority in deciding this question, for as our Court of Appeals recently declared: "In our overall pattern of government, the judicial branch has the function of requiring the executive (or administrative) branch to stay within the limits prescribed by the legislative branch." National Automatic Laundry and Cleaning Council v. Schulz, 143 U.S. App. D.C. 274, 280, 443 F.2d 689, 695 (1971). Even more recently, the Eighth Circuit Court of Appeals, citing *inter alia* the opinion in *National Automatic Laundry* determined that a challenge to the legality of a decision by the Secretary of Transportation to defer obligation of funds already apportioned to the State of Missouri under the Federal-Aid Highway Act of 1956, as amended, 23 U.S.C. § 101 et seq (1970), presented a justiciable issue. The question was whether the Secretary had any discretion at all so to act. The State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir., 1973).

It seems clear, then, that for the reasons given and on the basis of the authorities cited, this Court is not barred from reaching the merits of this case either by the doctrine of sovereign immunity or by a lack of a justiciable case or controversy. Hence, it is appropriate now to proceed to the question raised in plaintiff's summary judgment motion, i.e., whether the Administrator had discretion to refuse to allot the sums authorized to be appropriated in § 207 of the Act, or—put the other way around— whether allotment of those sums is a purely ministerial act. The Court may resolve this question on summary judgment because the defendant, in his Statement sub-

mitted pursuant to Local Rule 9(h), has not set forth any specific facts showing that there is a genuine issue for trial. *See* Rule 56(e), F.R.Civ.P.

Resolution of the issue whether the Administrator is required under the Act to make the allotments in question here turns primarily on the meaning of § 205(a) and § 207 of the Act, which read as follows:

"ALLOTMENT

"SEC. 205. (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92–50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

"AUTHORIZATION

"SEC. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000."

In urging its interpretation of these sections, plaintiff places emphasis on the phrase, "shall be allotted" in § 205(a), contending that the use of "shall" rather than "may" makes plain the mandatory character of this section. The Administrator defends his interpretation (namely, that he has discretion to decide how much to allot) primarily on the grounds that H.R. 11896, the bill from which § 205 and § 207 of the Act are derived, was amended in conference by the insertion of the phrase "not to exceed" before each of the sums specified in § 207 and by the deletion of the word "all" before the phrase "Sums authorized to be appropriated" in § 205(a); both amendments, it is contended, are substantive changes meant to give the Administrator the discretion to withhold allotments as he has done. Given the arguments of the parties, a "plain meaning" analysis is obviously inadequate to the task at hand. Rather, the Court must examine the relevant legislative history to determine whether Congress intended to give the Administrator the kind of discretion he claims to have under the Act. The Wilderness Society v. Morton, 156 U.S. App.D.C. ——, 479 F.2d 842 (1973), at 855.

Of particular importance are the views of sponsors of the legislation in question. See, e.g., First National Bank of Logan, Utah v. Walker Bank and Trust Co., 385 U.S. 252, 261, 87 S. Ct. 492, 17 L.Ed.2d 343 (1966);

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Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394–395, 71 S.Ct. 745, 95 L.Ed. 1035 (1951); Kansas City, Mo. v. Federal Pacific Electric Co., 310 F.2d 271 (8th Cir. 1962), cert. denied, 371 U.S. 912, 83 S.Ct. 256, 9 L.Ed.2d 171, and 373 U.S. 914, 83 S.Ct. 1297, 10 L.Ed.2d 415. Specifically, the Court can properly look to the expressed views of Congressman William Harsha, who is the ranking minority member of the House Committee on Public Works, which reported H.R. 11896, and who was also the bill's floor manager and a member of the conference committee which worked out the final language of the Act, and the views of Senator Edmund Muskie, who is Chairman of the Senate Subcommittee on Air and Water Pollution, which reported the Senate version, S. 2770, and who was floor manager of that bill and a member of the conference committee. It was Congressman Harsha who sponsored the amendments on which the Administrator relies.

An examination of pertinent portions of congressional debates quoted by both plaintiff and defendant reveals that Congressman Harsha intended his amendments not to make any substantive change in the bill but rather to clarify (or "emphasize," to use his own term) the point that the Administrator was to have discretion regarding the *obligation and expenditure* of funds authorized to be appropriated under the Act. Thus, in explaining his amendment, Congressman Harsha said: "I want to point out that the elimination of the word "all" before the words "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207 was intended by the managers of the bill to emphasize the President's flexibility to control the *rate of spending.*" 118 Cong. Rec. at H9122 (daily ed. October 4, 1972) (emphasis added). Moreover, it is clear from an exchange of remarks by Congressman

Robert Jones of Alabama, Chairman of the conference committee, Congressman Gerald Ford of Michigan, and Congressman Harsha, that this intent was made known to the House, which later voted in favor of the legislation as amended. That exchange is recorded as follows:

> Mr. GERALD R. FORD:
> Mr. Speaker . . . I think it is vitally important that the intent and purpose of section 207 is spelled out in the legislative history here in the discussion on this conference report.
>
> As I understand the comments of the gentleman from Ohio [Harsha], the inclusion of the words in section 207 in three instances of "not to exceed" indicates that is a limitation. More importantly that it is not a mandatory requirement that in 1 year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*
>
> Mr. HARSHA. I do not see how reasonable minds could come to any other conclusion than that *the language means we can obligate or expend up to that sum*—any thing up to that sum but not to exceed that amount. * * *
>
> Mr. GERALD R. FORD. Mr. Speaker, I would like to ask the distinguished chairman of the subcommittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio (Mr. Harsha).
>
> Mr. JONES of Alabama.
> . . . My answer is "yes." Not only do I agree with him, but the gentleman from Ohio offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio (Mr. Harsha).

> Mr. GERALD R. FORD. Mr. Speaker, this clarifies and certainly ought to wipe away any doubts anyone has. *The language is not a mandatory requirement for full obligation and expenditure up to the authorization figure in each of the 3 fiscal years.*

Id., at H9123 (emphasis added.)

The Administrator is not supported in his interpretation of the Act's legislative history by citing remarks of Congressman Harsha concerning authority for Executive "impoundment" of funds. During the debates on H.R. 11896, Congressman Harsha took note of recent impoundments by the Executive branch of moneys allocated among the States under the Federal-Aid Highway Act of 1956, and made the following observation:

> [T]he Committee on Public Works is acutely aware that moneys from the highway trust fund have been impounded by the Executive. Expenditures from the highway trust fund are made in accordance with similar contract authority provisions to those in this bill. Obviously *expenditures and appropriations* in the water pollution control bill could also be controlled. However, there is even more flexibility in this water pollution control bill because we have have added "not to exceed" in section 207, as I indicated before.
>
> Surely, if the administration can impound moneys from the highway trust fund which does not have the flexibility of the language of the water pollution control bill, it can just as rightly *control expenditures from the contract authority produced in this legislation by that same means.*

Id., at H9122 (emphasis added).

The impoundments of Federal-Aid Highway Act moneys referred to by Congressman Harsha were of funds already allotted, i. e., the controls were being

exercised at the obligation level rather than at the allotment level.[10] Thus, these comments tend to support the position of the plaintiff rather than that of the defendant in regard to which administrative functions are discretionary and which mandatory under the Act which this Court is called on to construe. It seems obvious from the remarks just quoted that, as Senator Muskie observed:

> Under the amendments proposed by Congressman WILLIAM HARSHA and others, the *authorizations for obligational authority* are "not to exceed" $18 billion over the next 3 years. Also, "all" sums authorized to be obligated need not be committed, though they must be allocated. These two provisions were suggested to give the Administration some flexibility concerning the obligation of construction grant funds.

Id., at S16871 (emphasis added).

The President appears to have concurred in the views of the sponsors concerning § 205 and § 207 of the Act, for in his message explaining his veto of the bill, he stated:

> Certain provisions of . . . [the bill] confer a measure of *spending discretion and flexibility* upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.
>
> But the law would still exact an unfair and unnecessary price from the public. For I am convinced . . . that the pressure for full fund-

[10] It should be noted that the Court of Appeals for the Eighth Circuit has construed the Federal-Aid Highway Act as requiring obligation of allotted funds, and has thus declared the impoundments referred to by Congressman Harsha to be illegal. State Highway Commission of Missouri v. Volpe, 479 F.2d 1099, (8th Cir., 1973).

> ing under this bill would be so intense that funds approaching the *maximum authorized* amount could ultimately be claimed and paid out, no matter what technical controls the bill appears to grant the Executive. 118 Cong. Rec. at H10266 (daily ed. October 18, 1972) (emphasis added).

In other words, the President believed that the Act required the Administrator to allot the full amount authorized, and he feared that once the Administrator had made the allotments, he might be under great pressure to approve grant applications up to the amount of the allotments. Congress, believing that the needs to which the Act was addressed were sufficiently urgent that expenditure of the full amounts authorized might be necessary,[11] and believing further that the Administrator was given sufficient discretion to avoid any hasty and improvident obligation of funds, passed the bill over the President's veto.

The question whether the entire amount should be *obligated* is, of course, not before this Court. The only question is whether the full allotments must be made, and the answer to that on the basis of the foregoing review of the sponsors' comments seems clear. The language of the pertinent sections of the Act, read in the light of their legislative history, clearly indicates the intent of Congress to require the Administrator to allot, at the appropriate times, the full sums

[11] The central purpose of the Act as set forth in the first section is to effectuate "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." § 101 (a)(1). Congressman Harsha recognized that achieving this goal might well require spending the entire $18 billion authorized to be appropriated; and he observed: "To say we can't afford this sum of money is to say we can't afford to support life on earth." 118 Cong.Rec. H10268 (daily ed. October 18, 1972).

authorized to be appropriated by § 207.[12] Hence, this Court has no choice other than to declare that § 205(a) of the Act requires the Administrator to allot among the states $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974.

The only question remaining for decision is whether plaintiff's action may be maintained as a class action on behalf of all similarly situated municipalities within the State of New York. Defendant has opposed maintenance of this suit as a class action solely on the ground that plaintiff does not satisfy subsections (a)(3) and (a)(4) of Rule 23, Fed.R.Civ.P., i.e., it is contended that plaintiff's claim is not typical of those of the proposed class members and that plaintiff cannot adequately represent the class. The Court does not find these points well taken. Differences in amounts which various municipalities might receive from the State allotment have no bearing on the legal issue of whether the allotment as a whole should be increased. Neither can such differences make the City of New York something less than an adequate representative of the class as required by Rule 23(a)(4). Competition for shares of a common fund does not bar a class action on behalf of all competitors when the relief sought would lead to an increase in the total amount of that fund. Berman v. Narragansett Racing

[12] As previous discussion has indicated, pp. 675–676, *supra*, this construction of the Act does not infringe upon any prerogative of the Executive branch. The Court is thus not confronting any delicate constitutional question of the kind which Mr. Justice Brandeis, in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345–348, 56 S.Ct. 466, 80 L.Ed. 688 (1936), counseled courts to avoid. Hence defendant's reliance on *Ashwander* as authority for the proposition that the Act should be construed so as to enhance his powers at the expense of those of the Congress is not well taken.

Association, 414 F.2d 311, 317 (1st Cir. 1969), cert. denied, 396 U.S. 1037, 90 S.Ct. 682, 24 L. Ed.2d 681 (1970). The Court finds that plaintiff satisfies all the requirements of Rule 23(a) and 23(b)(1)(A), (b)(1)(B), and (b)(2); accordingly, the suit can be maintained on behalf of the proposed class.

APPENDIX F

CAMPAIGN CLEAN WATER, INC.

v.

WILLIAM D. RUCKELSHAUS, ADM. ENVIRONMENTAL PROTECTION AGENCY

Civ. A. No. 18-73-R

United States District Court, E. D. Virginia, Richmond Division, June 5, 1973.

ORDER

MERHIGE, *District Judge:*

In accordance with the memorandum this day filed and deeming it just and proper so to do, it is adjudged and ordered that:

1) Upon the Court's own motion, Robert W. Fri, Acting Administrator of the Environmental Protection Agency, shall be, and is hereby, substituted for William D. Ruckelshaus as the proper party defendant.

2) Campaign Clean Water, Inc., is granted leave to proceed in this action on behalf of its members and those similarly situated in the Commonwealth of Virginia.

3) Defendant's motion to dismiss shall be, and the same is hereby, denied.

4) Plaintiff's motion for summary judgment shall be, and the same is hereby granted.

5) It is declared that the announced policy of the Administrator to refuse to allot $6 billion of the desig-

nated $11 billion under Section 205 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 et seq., for the fiscal years 1973 and 1974 constitutes an abuse of discretion under the authority and powers conferred by the Act. Accordingly, said policy shall be, and the same is hereby, declared null and void.

6) The defendant is directed to report to the Court within ten (10) days of this date those actions taken to conform the administration of the Act to the principles enunciated in the memorandum.

MEMORANDUM

MERHIGE, *District Judge:*

Campaign Clean Water, an environmental group organized to "promote the ecological and environmental advancement of Virginia," seeks in this action to compel the defendant Administrator of the Environmental Protection Agency (E.P.A.) to allot among the states the full sums authorized to be appropriated by Section 207 of the Federal Water Pollution Control Act, as amended by Public Law 92–500 (the "Act") and to estop him from withholding funds so allotted. Jurisdiction is alleged pursuant to 28 U.S.C. §§ 1331 and 1361. The parties are presently before the Court pursuant to plaintiff's motion for summary judgment and defendant's cross-motion to dismiss. Respective counsel have submitted comprehensive memoranda on the issues raised, and it is upon same that this matter is ready for disposition.

The facts are not in dispute. For preliminary purposes they are as follows: On October 4, 1972 the Congress passed a water pollution bill authorizing appropriations in the amount of $11,000,000,000 for waste treatment plant construction grants for fiscal

years 1973 and 1974. The bill was vetoed on October 17, 1972 by the President who stated that he found the measure to be of an "inflationary" nature. The Congress promptly overrode the veto. On November 28, 1972 the Administrator announced that pursuant to the President's direction he was allotting only $5,000,000,000 of the total $11,000,000,000 for treatment plant construction projects for fiscal years 1973 and 1974. It is the Administrator's announced action, which is popularly referred to under the rubric of "impoundment of funds", which is challenged in this suit.

The issues raised are as follows:

1. Whether plaintiff has standing to maintain this action.

2. Whether this action is rendered moot by virtue of City of New York v. Ruckelshaus, 358 F.Supp. 669, CA No. 2466–72 (D.C.1973).

3. Whether the defendant is immune from this suit by virtue of the sovereign immunity doctrine.

4. Whether this matter presents a justiciable controversy.

5. Whether, upon the merits, plaintiff is entitled to the relief sought.

These issues will be considered in seriatim.

I. STANDING

Campaign Clean Water, Inc., as described in the complaint, is a Virginia corporation "organized to promote the ecological and environmental advancement of Virginia. Its officers, directors, and financial contributors include Virginia residents who use the nation's waters for both sport and commercial fishing and for other recreational purposes." The affidavit of the organization's president, Newton H. Ancarrow,

indicates that it was created through the efforts of various groups. Included among the founders is the Chesapeake Bay and its Tributaries Watermen's Union, whose members derive their income from shellfishing, and among its contributors are the Virginia Beach Innkeepers Association and other individuals who engage in boating and swimming on Virginia's waters and who own waterfront property. They allege that their interests are impaired by the discharge of untreated or inadequately treated sewage from overly burdened waste treatment plants into the waters of Virginia.

In particular, it is alleged that individual members of the groups who have formed and contributed to Campaign Clean Water, Inc., have suffered economic injury from contaminated waters caused by sewage discharge from several plants operated by the Hampton Roads Sanitation District. Members of the Chesapeake Bay and its Tributaries Watermens Union, for example, allege that shellfish beds in the area have been rendered unusable by such contamination. The injuries of the various members of Campaign Clean Water, Inc., are tied to the acts of the defendant by the allegation, supported by a letter from the General Manager of the Hampton Roads Sanitation District, that the withholding of funds will have a disastrous effect on future plans for water treatment plants on Virginia's waters and will thus allow the injury to the plaintiff's interests to continue.

The doctrine of standing, emanating from the case or controversy requirement of Article III of the Constitution and from general principles of judicial administration, seeks to ensure that the plaintiff to an action has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues

upon which the Court so largely depends . . ." Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). Problems of standing in actions against public officials may arise in either of two contexts, depending upon whether the plaintiff relies in his action upon a statute authorizing the invocation of the judicial process.

The majority of cases in which the plaintiff relies upon such a statute involves the Administrative Procedure Act (APA) and its language granting the right of review to any party "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Standing in such cases is available only where the plaintiff has alleged active injury in fact at the hands of the defendant and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutory requirements to which the plaintiff seeks to compel adherence. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Where the plaintiff does not rely upon a specific statute such as the APA, he still must meet standing requirements which are virtually identical to those imposed by the APA. Specifically, he must allege an actual injury to himself and in addition show that such injury is to an interest that is protected by the legal right which he asserts is violated by the defendants' act. Linda R. S. v. Richard D., 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973). As the Supreme Court has framed the second aspect, there must be a "logical nexus between the status [of the plantiff] asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968).

Although the plaintiff does not invoke the APA in pursuing this claim, the Court is satisfied that the action is one which could have been brought pursuant to that act. See City of New York v. Ruckelshaus, 358 F.Supp. 669, CANo. 2466–72 (D.D.C.1973). Even if it could not, however, the Court's foregoing discussion leads it to conclude that generally the same standards apply as would apply in an APA case. In either case, Campaign Clean Water clearly has standing in this action.

The allegations of the complaint and affidavit indicate that individual members of groups belonging to and contributing to the plaintiff suffer direct, pecuniary injury as a result of waste contamination in Virginia's waters. Such injury is particularized and sets these members apart from the public, in general. Since an organization whose members are injured may represent those members in judicial proceedings, Sierra Club v. Morton, 405 U.S. 727, 739, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); James River and Kanawha Canal Parks, Inc., v. Richmond Metropolitan Authority, 359 F.Supp. 611 (E.D.Va.1973), Campaign Clean Water, Inc., may assert these claims. The fact that the groups representing the individuals injured rather than the individuals themselves are the actual members of Campaign Clean Water is unimportant, since it is the interests of the individual persons that the plaintiff ultimately represents.

The Court further finds that the requisite nexus between the injury and the right asserted exists in this case. The plaintiff by its allegations directly attributes the injury incurred to the inadequacy of waste treatment plants, particularly in the Hampton Roads area. With federal money, new treatment plants will be built and old ones improved, all of which will lessen the existing damage suffered by the plaintiff. Since

the plaintiff's assertion is that the defendant is under a duty to release federal funds for waste treatment plants, it is clear that the injury incurred falls within the scope of interests benefitted by that duty. Accordingly, Campaign Clean Water, Inc., has standing to pursue this action.

II. MOOTNESS

The Court *sua sponte* raises the issue of mootness in view of the recent District Court decision of Judge Oliver Gasch in City of New York v. Ruckelshaus, 358 F.Supp. 669, CANo. 246–72 (D.D.C. 1973). In that action, the plaintiffs, the Cities of New York and Detroit, challenged the refusal of the present defendant to allot the funds appropriated under the Act which are the subject of this action. Judgment was entered for plaintiffs. Whether or not the Administrator will appeal that decision is unknown at this time.

The Court has examined Judge Gasch's opinion and concludes that, in light of the relief sought and order entered in that matter, the present action is not moot.

The City of New York sued on behalf of itself and all similarly situated municipalities in the State of New York. The City of Detroit, additionally, was granted leave to intervene as plaintiff. While the relief granted included *inter alia* declaratory and injunctive relief which applies to the whole fund, the Court has some doubts that the present plaintiffs could, in view of the class definition in *City of New York,* properly enforce that judgment as it applies to them.

There is, however, a more compelling reason militating against mootness which, in part, derives from the peculiar nature of the administrative procedures

under the Act. While these procedures will be reviewed at length *infra*, for these purposes a brief summary will suffice.

The procedure is as follows:

Section 207 authorizes specific sums of money to be appropriated. The administrator is required by § 205 to allot the sums in accordance with a formula set forth in § 205(a). Once allotted to the states or municipalities' contract authority exists up to these amounts. In a second stage, the Administrator reviews grant applications from the states and municipalities to determine whether they satisfy the criteria of § 204 of the Act. Once these plans are approved, a contractual obligation on the part of the United States arises to pay the federal share allocable to the project. In sum, there is a two step process of 1) allotment and 2) expenditure.

The *City of New York* suit challenged only alleged abuses of discretion by the defendant with respect to allotment. Relief with respect to the expenditure stage was neither sought nor granted. This action seeks relief with respect to alleged abuses of discretion or possible abuses of discretion at both stages of the program. For this reason as well, this action is not moot.

III. SOVEREIGN IMMUNITY

The defendant grounds his motion to dismiss in part upon an asserted application of the "sovereign immunity" doctrine. The gravamen of that doctrine has been stated in Land v. Dollar, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947): a suit is one against the sovereign, and therefore barred, if "[t]he 'essential nature and affect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." While the

instant matter squarely falls within this definition, it also falls within a well-settled exception to the sovereign immunity doctrine.

Said exception is expressed in Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), which holds that a suit may be brought against an officer of the United States to challenge an action which allegedly exceeds statutory authority or, if within the scope of authority, is premised upon a power which is unconstitutional. See also Malone v. Bowdoin, 369 U.S. 643, 647 82 S.Ct. 980, 8 L.Ed.2d 168 (1962). One common vehicle for challenging an official's action upon this theory is mandamus jurisdiction, 28 U.S.C. § 1361, which is relied upon here by plaintiff.

The complaint alleges that the defendant has exceeded his statutory authority in impounding funds. If sustained on the merits, plaintiff will come within the above recited exception to the doctrine. Accordingly, at this stage, the Court is satisfied that Campaign Clean Water has carried its burden in overcoming the bar of sovereign immunity.

IV. JUSTICIABLE CASE OR CONTROVERSY

The defendant urges that this action does not present a justiciable case or controversy. A two-pronged argument is presented, and the two issues raised thereby will be considered in turn.

A. Ripeness

Defendant contends that this action is premature. The gravamen of that argument is that plaintiff (or those interests it represents) is without a claim absent specific denial of funds to proposed projects. Because no proposals have been submitted and rejected, it is argued that the present claim is hypothetical.

Defendant's argument is without merit. Legislative history is probative of the fact that the scheme of allotment followed by obligation was adopted in the Act to facilitate long range planning, a necessary element in the development of water treatment plants. 118 Cong. Rec. H. 2727 (3/29/72); *City of New York supra.* Because funds are allotted on a yearly basis (Section 207), it appears that those funds not allotted in the appropriate year are forever lost.[1] The failure to allot, therefore, may have a decisive and detrimental impact upon treatment plant development planning. Said impact gives rise in part to the injuries alleged here and satisfies the Court that this action is not premature.

B. Political question

The defendant urges that plaintiff has called upon the Court to decide a "political question," which it is asserted is beyond the proper exercise of federal court jurisdiction. Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946), Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). While the Court is cognizant that the issue raised here has contemporary political overtones, it is satisfied, for reasons that follow, that this matter does not present a political question in the legal sense. The Supreme Court in Baker v. Carr, 369 U.S. at 217, 82 S.Ct. at 710 clarified this distinction and enunciated as well the standard by which political questions may be identified:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more

[1] However, funds allotted for a given year but not obligated may be reallotted the following fiscal year § 205(b)(1).

> elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it: or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made, or the potentiality of embarassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.

In determining whether this action, by reason of the above recited standards, presents a political question, the Court has considered defendant's assertion that "[w]hile spending controls are not 'textually committed' by the Constitution to any of the three departments, it is clearly not a matter for the judiciary. Moreover, the grant of 'executive power' in Article II comes very close to a 'textually demonstrable' commitment of this responsibility to the President." Defendant's brief at 11. Defendant overstates the issue here present: *contra* to defendant's broad assertions, the Court is required to determine whether the specific

Act in question mandates spending policies in contravention to those announced by the Administrator. This is a narrow issue and a matter of statutory interpretation. The Court recognizes that this conclusion impliedly makes short shrift of defendant's underlying contention that spending of funds legislatively appropriated is solely within the province of executive discretion. Nevertheless, to support defendant's contention would require the Court to postulate a broad reading of executive power which includes the proposition that the Congress may make funds available for spending or mandate the manner in which they are spent, but may not mandate that they, in fact, be spent. That contention has in essence been firmly rejected in a well-reasoned opinion by Judge Jones in Local 2677 v. Phillips, 358 F.Supp. 60 (D.D.C.1973). As Judge Jones noted in language appropriate here, "[t]he defendant really argues that the Constitution confers the discretionary power upon the President to refuse to execute laws passed by Congress with which he disagrees."

More than a century ago the United States Supreme Court laid to rest any contention that the President has the power suggested. See Kendall v. United States, 12 Pet. 524, 37 U.S. 524, 9 L.Ed. 1181 (1838), where the Court stated:

> To contend, that the obligation imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible. 37 U.S. at 611.

See also National Automatic laundry v. Shultz, 143 U.S.App.D.C. 274, 443 F. 2d 689, 695 (1971), holding that "the judicial branch has the function of requiring the executive (or administrative) branch to stay within the limits prescribed by the legislative branch."

Accordingly, the issue before the Court calls for an interpretation of the Act. There is no issue here vis-a-vis "executive power" and in that respect this case does not present a political question. Defendant also urges that there is a "lack of judicially discoverable and manageable standards for resolving" the questions posed here. The Court disagrees. The Court is not being asked to supervise the operations of the EPA. Solely sought here is declaratory and injunctive relief with respect to the announced policy of impoundment. The standards for fashioning that relief, if appropriate, will be discussed in conjunction with the merits. At this stage, however, the Court fails to discern a political question lurking in the record before it.

V. THE MERITS

Plaintiff essentially challenges the defendant's announced policy with respect to impoundment of allotments and prays as well that the Court retain jurisdiction so as to grant appropriate relief to prevent abuse of discretion with respect to appropriations. The allotment question will be considered first.

A. Allotment

The relevant portions of the Act read *inter alia* as follows:

ALLOTMENT

> Sec. 205. (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollu-

tion Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92–50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

AUTHORIZATION

Sec. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

The specific issue is whether the langauge of § 205, "Sums authorized to be appropriated . . . shall be allotted . . ." allows the discretionary impoundment policy announced by the Administrator. The parties have taken preliminary positions upon the face of the statute. Plaintiff urges that the phrase "*shall* be allotted" proscribes the exercise of discretion announced by the defendant; the Administrator, on the other hand, urges that the language "not to exceed" in section 207 is expressive of the range of discretion built into the Act. See Housing Authority of San

Francisco v. United States Department of Housing and Urban Development, 340 F.Supp. 654 (N.D.Cal. 1972). Because the statute itself gives rise to conflicting interpretations, inquiry directed beyond the precise language is called for.

Defendant urges that legislative history is supportive of his position. Specifically he cites amendment of the language in question by a House-Senate conference committee which deleted the word "all" before the phrase "sums authorized to be appropriated" in § 205 and the addition of the aforementioned phrase "not to exceed" in § 207. With specific reference to § 205 the Court finds the amendment highly significant. Thus, the House bill originally considered read:

> "*All* sums authorized to be appropriated . . . shall be allotted by the Administrator . . ." (emphasis supplied).

The amended section reads as amended:

> "Sums authorized to be appropriated . . . shall be allotted by the Administrator . . ."

Defendant urges that the only logical interpretation of this amendment is that the Congress did not intend that "all" sums authorized be appropriated, or conversely, that the Administrator was given authority to exercise his discretion in that regard. The views of Congressman Harsha, the House sponsor, are supportive of this view:

> Furthermore, Mr. Speaker, we have emphasized over and over again that if Federal spending must be curtailed, and if such spending cuts must affect water pollution control authorizations, the administration can impound the money.
>
> I want to point out that the elimination of the word "all" before the word "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207 was intended to em-

phasize the President's flexibility to control the rate of spending. 118 Cong.Rec. H. 10268.

Yet the Senate sponsor, Senator Muskie, was of the opinion that this "flexibility to control the rate of spending" occurred at the obligation rather than allotment stage:

> Under the amendments proposed by Congressman WILLIAM HARSHA and others, the *authorizations for obligational authority* are "not to exceed" $18 billion over the next 3 years. Also, "all" sums authorized to be obligated need not be committed, though they must be allocated. These two provisions were suggested to give the Administration some flexibility concerning the obligation of construction grant funds.

Id., at S 16871 (emphasis added).

This view is itself not inconsistent with other remarks by Congressman Harsha which followed his above recited statement:

> I might add, while this legislation does provide for contract authority, the present administration recommended contract authority in H.R. 18779, the bill I introduced in behalf of the administration some time ago. Furthermore, let me point out, the Committee on Public Works is acutely aware that moneys from the highway trust fund have been impounded by the Executive. Expenditures from the highway trust fund are made in accordance with similar contract authority provisions to those in this bill. Obviously expenditures and appropriations in the water pollution control bill could also be controlled. However, there is even more flexibility in this water pollution control bill because we have added "not to exceed" in section 207, as I indicated before.
>
> Surely, if the administration can impound moneys from the highway trust fund which does not have the flexibility of the language of the water pollution control bill, it can just as rightly control expenditures from the contract authority produced in this legislation by that same means.[2]
>
> Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. This is the pacing item in the expenditures of funds. It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures.

Id. at H 10268.

Judge Gasch in *City of New York* concluded from this language and other by-play that, in accordance with Senator Muskie's views, the discretionary elements incorporated into the Act and referred to by the various legislators were meant to apply to executive control over the "rate of spending," but that the rate of spending was to be monitored only at the obligation stage and not by the withholding of allotments.

This Court respectfully declines to adopt this interpretation, primarily because it appears to de-emphasize the syntactical history of Section 205 which shows the purposeful removal of the word "all" from § 205. While the legislative debates lend strength to Judge Gasch's conclusion, the Court, the plaintiff,

[2] As Judge Gasch observed in *City of New York*, Cong. Harsha's position has itself been rendered suspect by a subsequent Court decision:

> It should be noted that the Court of Appeals for the Eighth Circuit has construed the Federal-Aid Highway Act as requiring obligation of allotted funds, and has thus declared the impoundments referred to by Congressman Harsha to be illegal. State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir., 1973).

and, to a limited extent, the defendant, are in agreement that legislative history is in the main unclear, politically charged, and in the Court's view, to some degree based upon suspect constitutional interpretation of the powers of the President.[3] In this context the syntactical history must be given great weight. See generally Gilbert v. General Electric, 347 F.Supp. 1058 (E.D.Va. 1972). The Court accordingly concludes that the Congress did intend for the executive branch to exercise some discretion with respect to allotments. Plaintiff, in fact, does not seriously dispute this conclusion, but contends that "the Congress could not have intended to give the Administrator the discretion to gut the Act." This latter contention merits close scrutiny.

Legislative history from the time of the veto is especially helpful because the executive's position with regard to bill passed was framed in the context of its alleged inflationary impact. Accordingly, the issue of just how much was required to be spent under the terms of this legislation was central to the discussion that followed.

The President's veto message with regard to the Act is made perfectly clear in the following language from his veto message:

> Certain provisions of . . . [the bill] confer a measure of spending discretion and flexibility upon the President, and *if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.*

[3] See note 2, *supra* (re: highway fund impoundments) and discussion at page 695, *ante* (re: general power of the executive to withhold funds absent congressional authorization.)

> But the law would still exact an unfair and unnecessary price from the public. For I am convinced . . . that the pressure for full funding under this bill would be so intense that funds approaching the maximum authorized amount could ultimately be claimed and paid out, no matter what technical controls the bill appears to grant the Executive. 118 Cong.Rec. at H 10266 (daily ed. October 18, 1972) (emphasis added).

Both houses of Congress promptly overrode the veto. Prior to the respective votes, Senator Muskie reiterated the national commitment to clean water,[4] and cognizant of the spending discretion vested by the Act in the President, urged that the large scale policy adopted be reaffirmed by overriding the veto. 188 Cong.Rec. S 18546 et seq. Eighty-one percent of the Senators present voted to override.

Representative Harsha, upon resubmission, expressly addressed the alleged inflationary nature of the bill, stating that a large scale water improvement effort was worth the price that might be caused:

> I don't think there is one Member of this body who has not asked his constituents whether or not they were willing to pay the high price to achieve our national environmental goals. I don't think that there is one Member of this body who could report that after such polling, his constituents objected * * *
> * * * [T]he President maintained that a vote to override the veto of the Water Pollution Act Amendments of 1972 was a vote to increase

[4] Interestingly, the Senate had originally chosen not to pass an administration bill (S. 1013) which would have authorized sums close to those slated for spending under the challenged impoundment policy.

> the likelihood of higher taxes. So be it, the public is prepared to pay for it. To say we can't afford this sum of money is to say we can't afford to support life on earth. Id. at H 10268.[5]

The House voted by a margin of 91% of those present to override.

From the above recited history, the Court draws several conclusions:

1) The Congress passed a large scale clean water bill committing the nation to an extensive program to fight pollution. In so doing, the Senate rejected a smaller scale commitment proposed by the administration.

2) The Congress purposefully incorporated provisions in the Act which would allow some degree of spending discretion by the executive. These provisions were motivated in part by a desire to avoid a veto, see 118 Cong.Rec. at S. 16871, and in part by the assumption of some legislators (notably Rep. Harsha),

---

[5] The tenor of these remarks is akin to the remark of Senator Muskie prior to passage of the bill:

"* * * [T]hose who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this [water pollution] crisis.

"The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the Federal Government in 75-percent grants to municipalities during fiscal years 1973–75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation. * * *

"* * * [T]he conferees are convinced that the level of investment that is authorized is the minimum dose of medicine that will solve the problems we face. 118 Cong. Rec. S 16870 et seq."

but not all (notably Senator Muskie), that some funds may be impounded.

3) The President vetoed the bill because of its alleged inflationary impact, notwithstanding his recognition of the discretionary provisions of the bill.

4) The Congress overrode the veto by large margins, reaffirming the massive national commitment to environmental protection and the willingness to incur vast expenses in achieving that commitment.

Upon the foregoing, the Court is well-satisfied that the challenged impoundment policy, by which 55% of the allocated funds will be withheld, is a violation of the spirit, intent and letter of the Act and a flagrant abuse of executive discretion. Accordingly, the Court will enter a declaratory judgment holding that that policy is null and void.

Further relief, however, is not now required. The Court will not and cannot supervise the Administrator in the administration of the Act. Issuance of an injunction would accordingly be inappropriate. While the Court has no reason to conclude that the defendant will not make a good faith effort to proceed in the allotment of funds in accordance with the letter and spirit of this memorandum, it does note that the plaintiff may at any time move to reopen this matter so as to contest such future actions or lack of actions on the part of the Administrator as they may contend are arbitrary, capricious or violative of the Act as herein enunciated. At this stage, the Court will only require that the defendant report to the Court within ten (10) days of this date such actions as have been taken to conform the administration of the program to the principles enunciated in this memorandum.

B. Appropriations

For the reasons heretofore stated, the Court is satisfied that the defendant may not with propriety adopt policies which contravene the letter and spirit of the Act. However, specific relief with respect to future appropriations at this stage would be premature, especially in view of the expert discretion designed for the appropriations stage. See *City of New York, supra.* For these purposes, the Court concludes that the declaratory relief issued with respect to the allotment stage will place the defendant on notice that a similarly designed and motivated impoundment policy with respect to appropriations would contravene the letter and spirit of the Act.

VI. SCOPE OF RELIEF

In view of the nature of the relief granted, the Court declines to issue same with respect to those interests not represented directly by plaintiffs. To do otherwise would potentially burden the Court and prospective parties with reviewing individual actions of the Administrator which may apply to locations in more appropriate forums. Accordingly, declaratory judgment will be issued only with respect to those interests in Virginia represented by the plaintiff organization. This determination as well precludes further difficulties of class determination and notice not warranted by the nature of the relief given.

An order consistent with this memorandum shall issue.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
JUN 13 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1377

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

—v.—

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK

CITY OF DETROIT.

No. 73-1378

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

—v.—

CAMPAIGN CLEAN WATER, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED MARCH 11, 1974
CERTIORARI GRANTED APRIL 29, 1974

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Supreme Court of the United States

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 2466-72

THE CITY OF NEW YORK on behalf of itself and all other similarly situated municipalities with the State of New York
CITY OF DETROIT (PARTY-PLAINTIFF)

vs.

WILLIAM D. RUCKELSHAUS, as Administrator of the United States Environmental Protection Agency

ACTION FOR DECLARATORY JUDGMENT

	Filings—Proceedings
Dec. 12, 1972	Complaint, appearance, Exhibit—filed.
Dec. 12, 1972	Summons, Copies (3) and Copies (3) of Complaint issued—all served Dec 13.
Jan. 19, 1973	Motion of Anthony R. Martin—Trigona for leave to intervene, to consolidate and transfer; exhibits (2) c/m ....; Deposit $5.00 by Martin-Trigona.
Jan. 23, 1973	Motion of Plaintiff for extension of time to respond to motion of Anthony R. Martin-Trigona to intervene; c/m Jan. 23, 1973.
Jan. 24, 1973	Motion of defendant for enlargement of time to respond to motion to intervene and motion to consolidate, P&A; c/m Jan 24, 1973.
Jan. 24, 1973	Appearance of Arnold T. Aikens, Assistant U.S. Attorney, David J. Anderson, Stuart E. Schiffer and Dennis G. Linder, Civil Division, U.S. Department of Justice.

Filings—Proceedings

Jan. 29, 1973	Order granting plaintiff's motion for extension of time to respond to motions of Anthony R. Martin-Trigona to intervene, consolidate and transfer to and including Feb. 7, 1973. (N) Gasch, J.
Jan. 29, 1973	Order granting defendant's motion for enlargement of time to respond to motions to intervene, consolidate and transfer of Anthony R. Martin-Trigona to and including Feb. 1, 1973. (N) Gasch, J.
Feb. 1, 1973	Opposition of defendant to motion to intervene and to consolidate and transfer; P&A. c/m Feb. 1, 1973.
Feb. 1, 1973	Memorandum of P&A by plaintiff in opposition to motion to intervene; table of cases; c/m Feb. 1, 1973.
Feb. 6, 1973	Memorandum, opinion and Order denying motion of Anthony R. Martin-Trigona to intervene and consolidate action with similar action pending in the U.S. District Court for the Northern District of Illinois. (N) Gasch, J.
Feb. 12, 1973	Motion of plaintiff for summary judgment and to determine that this action may be maintained as a class action; statement; affidavit; P & A. table of cases; memorandum; exhibits A & B. c/m Feb. 12.
Feb. 12, 1973	Motion of defendant to dismiss; P & A. c/m Feb. 12.
Feb. 20, 1973	Stipulation of parties extending to and until March 1, 1973, for defendant to file opposition to motion of plaintiff for summary judgment. (N) Gasch, J.

Filings—Proceedings

Feb. 23, 1973	Application of Senator Douglas LaFollette for permission to file brief as amicus curiae; Exhibit, appendix 1. Appearance of Senator Douglas LaFollette. (314 SE Capitol Bldg., Madison, Wisconsin, 53701)
Feb. 26, 1973	Order that Douglas LaFollette is permitted to file a brief as amicus curiae; all pleadings to be filed by March 5, 1973. (N) Gasch, J.
Mar. 1, 1973	Memorandum of P & A by plaintiff in opposition to defendants motion to dismiss; table of cases; table of Authorities; exhibit A; c/m March 1.
Mar. 2, 1973	Opposition of defendant to plaintiff's motion for summary judgment; P & A., statement. c/m March 1.
Mar. 5, 1973	Affidavit of Edward Lloyd, of serving copy or order of February 27, 1973 to counsel.
Mar. 22, 1973	Motion of City of Detroit, a Michigan Municipal Corp., for leave to intervene as a party-plaintiff, brief; affidavit of Gerald Remus; exhibit. c/m March 15. Deposit $5.00 by Rhyne. Appearance of Charles S. Rhyne.
Mar. 27, 1973	Motion of intervening plaintiff's for summary judgment; P&A; Table of Contents; table of cases; table of authorities statement, affidavit. c/m March 23.
Apr. 2, 1973	Motion of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America for leave to file amicus curiae; memorandum. Exhibit. c/m Mar 30, 1973. Appearance of Stephen I. Schlossberg, 8000 E. Jefferson Ave., Detroit, Mich., 48214.

Filings—Proceedings

Apr. 3, 1973	Order granting motion of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America for leave to file a memorandum amicus curiae in support of plaintiffs motion for summary judgment. (N) Gasch, J.
Apr. 3, 1973	Order granting the motion of the City of Detroit to intervene. (N) Gasch, J. (signed 4-2-73).
Apr. 5, 1973	Request of City of Detroit, Intervenor plaintiff, for oral argument on motion for summary judgment.
Apr. 5, 1973	Supplemental affidavit by plaintiff in support of motion for summary judgment; Exhibit A, B, C, and D. c/s 4/5/73.
Apr. 5, 1973	Motion of the defendant to dismiss heard and taken under advisement; motion of plaintiff for summary judgment heard and taken under advisement. (Rep: Duane Duschaine) Gasch, J.
Apr. 6, 1973	Appearance of Evan A. Davis, Assistant Corporation Counsel, New York, New York.
Apr. 6, 1973	Appearance of Maureen P. Reilly, Assistant Corporation Counsel, Detroit, Michigan.
May 8, 1973	Memorandum & opinion denying motion of defendant to dismiss complaint; granting motion of plaintiff for summary judgment; and action to be maintained as a class action; (N). Gasch, J.
May 8, 1973	Order granting motion of plaintiff for summary judgment & action to be maintained as a class action; denying motion of defendant to dismiss. (N) Gasch, J.

Filings—Proceedings

May 18, 1973	Order substituting the fourth line of page 2 of the Opinion of May 8, 1973 to read "pursuant to 505(e) of the Act" instead of "Pursuant to 505(a) of the Act" (N) (signed 5-17-73) Gasch, J.
May 24, 1973	Notice of appeal by defendants from order of 5-8-73. Copies mailed to James R. Atwood and Maureen P. Reilly.
May 24, 1973	Motion of defendant for stay pending appeal; P & A; c/m 5-23-73.
June 4, 1973	Points and Authorities of plaintiff, City of New York, in opposition to motion for stay pending appeal; c/m 6-4-73.
June 12, 1973	Reply of defendant to plaintiffs partial opposition to his motion for stay pending appeal c/m 6-12-73.
June 14, 1973	Order granting motion of defendant staying order dated May 8, 1973; parties shall confer and attempt to agree upon an expedited briefing schedule in the Court of Appeals. (N) Gasch, J.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 2466-72

THE CITY OF NEW YORK, Municipal Building, New York, N.Y. 10007 (212) 566-2091, on behalf of itself and all other similarly situated municipalities within the State of New York, PLAINTIFF

—against—

WILLIAM D. RUCKELSHAUS, 401 M Street, S.W., Washington, D.C. 20460 (202) 755-2673, as Administrator of the United States Environmental Protection Agency, DEFENDANT

COMPLAINT

ACTION FOR DECLARATORY JUDGMENT AND MANDAMUS

Plaintiff, The City of New York, by its attorneys, complaining of defendant, alleges:

I

COMPLAINT

1. This is an action for a declaratory judgment and mandamus to compel defendant to comply with the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 86 Stat. —— [hereinafter "Act"], by allotting to the State of New York the amount mandated by section 205(a) of the Act.

II

JURISDICTION AND VENUE

2. This action is brought pursuant to section 505(e) of the Act, 5 U.S.C. §§ 701-706 and 28 U.S.C. §§ 1361,

2201. This Court has jurisdiction of this action by virtue of 28 U.S.C. §§ 1331, 1332, because this action arises under the laws of the United States, because there is diversity of citizenship between the parties and because the amount in controversy exceeds $10,000, exclusive of interest and costs. This Court also has jurisdiction of this action by virtue of 28 U.S.C. § 1361, because the action is in the nature of mandamus to compel an officer of an agency of the United States to perform a duty owed to the plaintiffs. Finally, this Court has jurisdiction of this action by virtue of section 11-501(4) of the District of Columbia Code, because the amount in controversy exceeds $50,000, exclusive of interest and costs. An actual and justicable controversy exists between the parties regarding which plaintiffs require mandatory relief, as well as a declaration by the Court of their rights and of defendant's obligations and duties.

Venue is properly laid in this Court pursuant to 28 U.S.C. § 1391(e).

III

THE PARTIES

3. At all times hereinafter mentioned, plaintiff, The City of New York [hereinafter "City"], was and is a municipal corporation organized and existing under the laws of the State of New York. The City's principal office is at City Hall, New York, New York. The City is a "municipality," as that term is defined by section 502(4) of the Act.

4. At all times hereinafter mentioned, defendant, William D. Ruckelshaus [hereinafter "Administrator"], was and is the Administrator of the United States Environmental Protection Agency. The Administrator is charged by section 101(d) of the Act with the responsibility of administering the Act. The Administrator performs his official acts (including the act complained of herein) in and is officially a resident of the District of Columbia. The Administrator is not a citizen of the State of New York.

IV

Class Action Allegations

5. By virtue of section 201(g)(1) of the Act the City, and any other municipality (as that term is defined by section 502(4) of the Act) within the State of New York, may receive directly federal grants for the construction of publicly owned treatment works. The Administrator's refusal to allot to the States, pursuant to section 205 of the Act, the full amount of the sums authorized to be appropriated by section 207 of the Act injures the City and all other municipalities within the State of New York in the same manner. Specifically, the Administrator's failure to allot the sum required by the Act to be allotted to the State of New York significantly limits the number and amounts of the federal grants to the City and such other municipalities which can be obligated by the Administrator. Therefore, this action raises questions of law and fact common to the City and such other municipalities, the City's claims herein are typical of the claims of such other municipalities and the City will fairly and adequately protect the interests of such other municipalities. This action is maintainable as a class action in accordance with Rule 23(b)(1)(A), (b)(1)(B) and (b)(2), Federal Rules of Civil Procedure.

V

Statutory Provisions

6. The Act was passed on October 18, 1972, over the veto of the President.

7. Section 101(a)(4) of the Act states that "it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works" for the treatment of wastes that are discharged into the nation's waters.

8. Title II of the Act (§§ 201-212)—entitled "GRANTS FOR CONSTRUCTION OF TREATMENT WORKS"—sets forth the procedure by which States and

municipalities may secure federal financial assistance in the amount of 75 per cent of the cost of municipal sewers and treatment works. As set forth with particularity hereinafter, this procedure provides for the allotment among the States, pursuant to a formula, of the $11 billion available for grants to States and municipalities in the current and next succeeding federal years.

9. Section 201(g) of the Act authorizes the Administrator "to make grants to any . . . municipality . . . for the construction of publicly owned treatment works." By virtue of section 203(a) of the Act a grant—which is made when the Administrator approves a plan for a construction project—is "a contractual obligation of the United States." The Act does not require the Administrator to approve all projects that are submitted to him. Rather, he has broad discretion to determine whether a proposed project satisfies the criteria set forth in section 204; for example, that the applicant can assure proper and efficient operation of the project and that the capacity of the project is such that it will meet the needs to be served.

10. Section 203(a) provides further that grants to a State or a municipality within the State may be made only "from funds allotted to the State under section 205."

11. Section 205(a) mandates allotments. It provides:

> Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the

States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92-50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

12. Section 207 authorizes appropriations in the amount of $5 billion, $6 billion and $7 billion for the fiscal years 1973, 1974 and 1975, respectively. It provides:

> There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

13. By virtue of sections 205(a) and 207 the Administrator is required to allot among the States $5 billion for the fiscal year 1973 and $6 billion for the fiscal year 1974. No provision of the Act or of any other law affords the Administrator discretion to reduce these allotments, whether by direction of the President or otherwise.

VI

Unlawful Acts

14. By letter dated November 22, 1972 (Exhibit I) the President directed the Administrator to withhold a portion of the allotments mandated by the Act. That letter says in relevant part:

> I stated [in my veto message] that even if the Congress were to default its obligation to the taxpayers through enactment of this legislation, I would not

> default mine. Under these circumstances, I direct that you not allot among the States the maximum amounts provided by section 207 of the Federal Water Pollution Control Act Amendments of 1972. No more than $2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974 should be allotted.

15. By Regulation promulgated and effective on December 8, 1972, the Environmental Protection Agency stated that, "in accordance with the President's letter of November 22, 1972," it was allotting among the States for the fiscal years 1973 and 1974 "sums not to exceed $2 billion and $3 billion, respectively" (37 Fed. Reg. 26282, § 35.910-1(a) (1972)), instead of the $5 billion and $6 billion required by the Act.

16. As a result of these reduced allotments, the amounts allotted to the State of New York, available for grants to the State and municipalities of the State, were $221.2 million and $331.7 million for the fiscal years 1973 and 1974, respectively, instead of the $553 million and $663.4 million required by the Act. 37 Fed. Reg. 26282, § 35.910-1(b) (1972).

VII

Injury

17. By directing the Administrator to allot among the States the sums authorized by section 207 of the Act, Congress intended that certain sums be immediately available in each State for obligation. Although the Administrator has discretion with regard to the obligation of sums after allotment, his discretion is not unlimited and is subject to review under applicable provisions of the Act and other laws. Thus, the Administrator's refusal to allot the sums authorized by section 207 directly injures plaintiffs because it permanently withdraws from availability in New York large portions (60 per cent in fiscal 1973 and 50 per cent in fiscal 1974) of the obliga-

tional authority conferred upon him by Congress. Plaintiffs must necessarily reduce the number of treatment works projects for which they can apply to the Administrator for federal grant assistance.

18. Section 205(b)(1) of the Act provides that any sums allotted to a State pursuant to section 205(a) "shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized." Section 205(b)(1) further provides that at the end of such one year period, sums allotted to a State which remain unobligated shall be immediately reallotted among the States by the Administrator. Such reallotments are to be in addition to any other allotments made to the States. Thus, section 205(b)(1) creates a mechanism to make allotted sums continually available, until obligated, to fund federal grants for treatment works. However, the Administrator's refusal to allot the full amount of the sums authorized by section 207 permanently removes such unallotted sums from the operation of the statutory mechanism for continual funding. Plaintiffs are injured by the Administrator's action because they are forever denied the availability of such unallotted sums for federal grants.

19. As a further result of the Administrator's illegal reduction of allotments, some treatment works that the Congress has determined are needed by the plaintiffs simply will not be constructed. The allotment amounts and distribution formula set forth in section 205(a) of the Act were based on a Congressional estimate of the current needs of all States and municipalities. Since any project that is the recipient of a grant under the Act must be 75 per cent funded by federal monies (section 202(a)), whatever federal money is available cannot be distributed among all needed projects; rather, it must be used to finance 75 per cent of each project as it is approved. Thus, many needed projects will simply go unbuilt because, in the absence of federal funds caused by the Administrator's illegal reduction, there will be insufficient federal funds to provide the 75 per cent federal share.

20. The Administrator's illegal reduction of allotments means that some of the plaintiffs—specifically, those that are unable to build needed projects for the reasons set forth in the immediately preceding paragraph—will be forced to violate the effluent standards established by section 301 of the Act, and thus will be subject to legal actions by the Administrator under section 309 of the Act and by any citizen under section 505 of the Act.

21. To the extent that the Administrator's illegal reduction of allotments results in needed treatment works not being built, the waters in the affected areas will continue to deteriorate, and the plaintiffs' residents will remain deprived of the environmental and recreational benefits that Congress intended to secure for them by passage of the Act.

WHEREFORE, plaintiffs demand judgment herein:

(a) Adjudging and declaring that section 205 (a) of the Act requires the Administrator to allot among the States $5 billion and $6 billion for the fiscal years 1973 and 1974, respectively; and

(b) Ordering the Administrator to revise the allotments he already has made, in purported compliance with section 205 (a), for the fiscal years ending June 30, 1973 and June 30, 1974, and to make said allotments in the amount of $5 billion for the fiscal year ending June 30, 1973 and $6 billion for the fiscal year ending June 30, 1974; and

(c) Such other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ Norman Redlich
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JOHN R. THOMPSON
EVAN A. DAVIS
GARY MAILMAN
ALEXANDER GIGANTE, JR.,

Of Counsel

EXHIBIT I

THE WHITE HOUSE

WASHINGTON

November 22, 1972

Dear Mr. Ruckelshaus:

The purpose of this letter is to request your cooperation in my attempt to maintain a strong and growing economy without inflation or tax increases.

Notwithstanding my earlier disapproval, the Congress enacted the Federal Water Pollution Control Act Amendments of 1972. This act permits a significant increase over our programs to fund the construction of wastewater treatment facilities. During this Administration, budget requests for this purpose have grown from $214 million for the fiscal year 1969 to $2 billion for the fiscal year 1973. The new act authorizes vastly larger sums. Furthermore, the Federal share of project costs has been increased significantly to a level of 75 percent.

In addition to the program increases in the new legislation, $5.1 billion of Federal funds are already committed or available for spending under former programs. Included in these amounts are:

- $1.9 billion to reimburse State and local governments which have funded projects without full Federal assistance.
- $1.8 billion of Federal funds to liquidate prior obligations for State and local projects.
- $1.4 billion in unobligated balances carried forward from fiscal year 1972 and prior years.

I stated that even if the Congress were to default its obligation to the taxpayers through enactment of this legislation, I would not default mine. Under these circumstances, I direct that you not allot among the States the maximum amounts provided by section 207 of the

Federal Water Pollution Control Act Amendments of 1972. No more than $2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974 should be allotted. These amounts will provide for improving water quality and yet give proper recognition to competing national priorities for our tax dollars, the resources now available for this program and the projected condition of the Federal treasury under existing tax laws and the statutory limit on the national debt.

I believe this course is the most responsible one—one which deals generously with environmental problems and at the same time recognizes the highest national priority, the need to protect the working men and women of America against tax increases and renewed inflation.

Sincerely,

/s/ Richard Nixon

Honorable William D. Ruckelshaus
Administrator
Environmental Protection Agency
Washington, D. C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2466-72

[Filed Feb. 12, 1973, James F. Davey, Clerk]

THE CITY OF NEW YORK, PLAINTIFF

v.

WILLIAM D. RUCKELSHAUS, DEFENDANT

MOTION TO DISMISS

Defendant William D. Ruckelshaus, Administrator of the Environmental Protection Agency, by his undersigned attorneys, hereby respectfully moves the Court, pursuant to Rule 12 of the Federal Rules of Civil Procedure, to dismiss this action. The grounds for this Motion are that the Court lacks jurisdiction over the subject matter of this suit and that the Complaint fails to state a claim upon which relief can be granted.

In support of this Motion, the Court is respectfully referred to the Points and Authorities filed herewith.

Respectfully submitted,

/s/ Harlington Wood, Jr.
HARLINGTON WOOD, JR.
Assistant Attorney General

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Harland F. Leathers
HARLAND F. LEATHERS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2466-72

[Filed Feb. 12, 1973, James F. Davey, Clerk]

THE CITY OF NEW YORK, on behalf of itself and all other similarly situated municipalities within the State of New York, PLAINTIFF

—against—

WILLIAM D. RUCKELSHAUS, as Administrator of the United States Environmental Protection Agency, DEFENDANT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DETERMINE THAT THIS ACTION MAY BE MAINTAINED AS A CLASS ACTION

Plaintiff respectfully moves the Court, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, to enter summary judgment in plaintiff's favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law. Plaintiff also moves the Court to enter an order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure determining that this action may be maintained as a class action. These motions are based upon the Complaint and attached Exhibit, plaintiff's Statement of Material Facts As To Which Plaintiff Contends There Is No Genuine Issue, the affidavit of Martin Lang, and plaintiff's Memorandum of Points and Authorities, all of which are filed herewith.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2466-72

THE CITY OF NEW YORK, PLAINTIFF

v.

WILLIAM D. RUCKELSHAUS, DEFENDANT

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant, by his undersigned attorneys, hereby opposes plaintiff's Motion for Summary Judgment. The grounds for this opposition are that there exists a disputed issue of material fact and that, even assuming that there is no genuine issue as to any material fact, plaintiff is not entitled to judgment as a matter of law. In support of this opposition, the Court is respectfully referred to the Points and Authorities filed herewith

and to the Points and Authorities filed in support of defendant's Motion to Dismiss.

Respectfully submitted,

HARLINGTON WOOD, JR.
Assistant Attorney General

HAROLD H. TITUS, JR.
United States Attorney

HARLAND F. LEATHERS

STUART E. SCHIFFER

DAVID J. ANDERSON

DENNIS G. LINDER

Attorneys, Department of Justice
Attorneys for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 2466-72

[Filed Feb. 12, 1973, James F. Davey, Clerk]

THE CITY OF NEW YORK, on behalf of itself and all other similarly situated municipalities within the State of New York, PLAINTIFF

—against—

WILLIAM D. RUCKELSHAUS, as Administrator of the United States Environmental Protection Agency, DEFENDANT

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARTIN LANG, being duly sworn, deposes and says:

1. I am the Commissioner of the Department of Water Resources (hereinafter "DWR") of the Environmental Protection Administration (hereinafter "EPA") of the City of New York (hereinafter "City"). As Commissioner of DWR, it is my responsibility to administer those functions delegated to EPA by Chapter 57 of the New York City Charter which relate to the construction, maintenance and operation of the City's sewage treatment plants. It is also my responsibility to administer the functions of EPA relating to the regulation and control of emissions into the waters within and about the City of harmful or objectionable substances, contaminants and pollutants.

2. I am a Professional Engineer, licensed by the State of New York. In 1935 I received a B.S. in engineering from the College of the City of New York. In 1954 I

received a Master's degree in civil engineering from New York University.

3. The purpose of this affidavit is to show the Court that the allotment reductions of which the City complains in this action, if sustained by this Court, will cause the City to delay and reduce its plans to construct needed sewage treatment works projects. Such delay and reduction necessarily will result in higher costs to the City (as well as to the State of New York and the Federal Government) in constructing needed treatment works, further degradation of the environmental quality of the navigable waters in and around the City, and violations by the City of the interim and final effluent standards of the Federal Water Pollution Control Act Amendments of 1972 (the "Act"). These results, moreover, will be visited not only upon the City, but upon many if not all of the other municipalities in the State of New York (hereinafter the "State") as well as across the nation.

4. The State has approved plans and specifications of certain of its municipalities for the construction of approximately 188 sewage treatment projects, expected to cost approximately $2 billion. These projects do not represent all the treatment works that will be needed in the State if the goals of the Act are to be achieved. Rather, they are needed projects that already have been approved by the State.

5. Because of the Federal Government's past failures to provide adequate financing, these approved projects have not been put out for bids.

6. Five of the projects are City projects that were submitted to the State in 1971. The total estimated cost of these five projects at the time that they were submitted was approximaely $591,842,000. There estimated cost now, as a result of a normal eight per cent (8%) per year escalation, is $637,287,000.

7. In purported compliance with the Act the Administrator, on December 8, 1972, allotted to the State $552,-900,000, to be available in the fiscal years 1973 and 1974 for the 75 per cent federal funding of treatment works projects. The City contends in this action that the Act

requires the Administrator to allot $1,216,400,000 to the State for said fiscal years. Thus, it is the City's position that the Administrator has illegally withheld $663,500,-000 from the State for possible use by municipalities within the State.

8. On November 15, 1972, I met with Henry L. Diamond, Commissioner of the Department of Environmental Conservation of the State of New York (hereinafter "DEC"), at which time Mr. Diamond apprised me that the Administrator was expected to allot to the State $552,900,000 for the fiscal years 1973 and 1974, with $221.2 million of this amount to be attributed to the fiscal year 1973. The Administrator's action of December 8, 1972 confirmed Mr. Diamond's expectation.

9. Under Section 204(a)(3) of the Act the Administrator may not approve a grant for a project until the project has been certified by the appropriate State agency as entitled to priority over other works in the State. Mr. Diamond told me at our November meeting that, *as a result of the expected allotment reduction by the Administrator*, the State would certify as entitled to priority in the fiscal year 1973 City projects in the amount of $90 million, or about forty per cent (40%) of the $221.2 million dollars actually allotted to the State for said fiscal year. This $90 million figure was confirmed to me by George M. Humphreys, Assistant Commissioner of DEC, on December 1, 1972, after the Administrator had publicly announced (on November 28, 1972) the reduction of allotments.

10. At our meeting of November 15, 1972 I was advised by Commissioner Diamond that DEC would certify to the United States Environmental Protection Agency (hereinafter "USEPA") as a priority project the upgrading of the City's Oakwood sewage treatment plant. Subsequently, by telegram dated January 5, 1973 the Commissioner notified me that the construction of the City's Red Hook plant was also being certified as a priority project.

11. The reduced allotment to the State will cause an indefinite delay in the commencement of the upgrading of three of the City's five needed sewage treatment

plants. Furthermore, although the other two projects—Oakwood and Red Hook—have been certified by the State in accordance with sections 204(a)(3) and 303(e) of the Act as priority projects for federal assistance, the upgrading of Oakwood and the construction of Red Hook must be conducted on a piecemeal basis because of the reduced level of such assistance.

12. The consequent delay in the commencement of the upgrading of three plants and in the time of completion of the upgrading of Oakwood (because it must be done on a piecemeal basis, will cause all such upgrading projects to be completed after July 1, 1977, which is the deadline established by section 301(b)(1)(B) of the Act for compliance by these plants with the effluent limitations promulgated pursuant to section 304(d)(1). Furthermore, under section 304(d)(1), Red Hook must be completed and in compliance with the effluent limitations within four years after its approval by the Administrator. Four years is the approximate construction time for a sewage treatment plant when construction is fully funded. To the extent that construction is conducted piecemeal, when each phase of construction must await the injection of additional funds, the time of construction is necessarily extended beyond four years.

13. The specifics of the City's situation illustrate the effect of the reduction of the allotment to the State. Because of the unavailability of funds, the upgrading of Oakwood cannot include, at the present, construction of a substantial portion of the important interceptor sewer system.

14. The construction of the Red Hook plant, which, when completed, will eliminate what is presently the daily discharge into New York Harbor of 70 million gallons of raw sewage, cannot begin in any significant degree. Although the DEC has certified to the USEPA that the Red Hook project is a priority project, the reduced federal allotment will only permit the commencement of a small $14.7 million phase of construction. The total cost of the project, in today's market, is $305.4 million.

15. The discharges of raw sewage which the Red Hook plant is intended to eliminate are a cause of the pollution of the City's Sea Gate and Coney Island beaches (and a contributing factor to the pollution of some areas to be included in the Gateway National Park). To the extent that construction and completion of the Red Hook plant are delayed by reduced federal financial assistance, the adverse environmental and recreational effects of the sewage discharges will continue to be visited upon the City and its residents.

16. The upgrading of the three remaining plants—Coney Island, Owls Head and Newton Creek—at a total cost of approximately $220 million, must be indefinitely delayed because federal assistance is not sufficient to permit even a token beginning on these projects.

17. In a discussion with my immediate superior, Jerome Kretchmer, then the City's EPA Administrator, which was televised on public television on December 19, 1972, the Administrator of USEPA acknowledged that the reduction in allotments would seriously hamper the City's efforts to move forward with treatment plant upgrading and construction.

18. In conclusion, the only way the City, through the DWR, can comply with the Act and achieve the Act's water quality goals, is with federal assistance at the level envisioned by Congress.

/s/ Martin Lang
MARTIN LANG

Sworn to before me this 5th day of February, 1973.

/s/ Catherine A. McGuinness
CATHERINE A. MCGUINNESS
Notary Public
State of New York. No. 03-2621650. Qualified in Bronx County. Commission Expires March 30, 1973.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 2466-72

[Filed Apr. 5, 1973. James F. Davey, Clerk]

THE CITY OF NEW YORK, on behalf of itself and all other similarly situated municipalities within the State of New York, PLAINTIFF

—against—

WILLIAM D. RUCKELSHAUS, as Administrator of the United States Environmental Protection Agency, DEFENDANT

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARTIN LANG, being duly sworn, deposes and says:

1. I am the Commissioner of the Department of Water Resources (hereinafter "DWR") of the Environmental Protection Administration (hereinafter "EPA") of the City of New York (hereinafter "City"). As Commissioner of DWR, it is my responsibility to administer those functions delegated to EPA by Chapter 57 of the New York City Charter which relate to the construction, maintenance and operation of the City's sewage treatment plants. It is also my responsibility to administer the functions of EPA relating to the regulation and control of emissions into the waters within and about the City of harmful or objectionable substances, contaminants and pollutants.

2. I am a Professional Engineer, licensed by the State of New York. In 1935 I received a B.S. in engineering from the College of the City of New York. In 1954 I

received a Master's degree in civil engineering from New York University.

3. By affidavit dated February 8, 1973, I explained the effect of the allotment reduction on the City's water pollution control program. The purpose of this affidavit is to update my first affidavit by relating the events which have occurred since February 8.

4. In my earlier affidavit I noted that two of the City's sewage treatment plant projects—Oakwood and Red Hook—had been certified to the United States Environmental Protection Agency ("USEPA") by the State of New York as priority projects for federal grant assistance. (¶ 10). I also explained, however, that because of the allotment reduction these projects could only be funded in phases, thus delaying substantially their completion. (¶¶ 13, 14).

5. On March 1, 1973 USEPA notified the City that the first phases of the Oakwood and Red Hook projects had been approved. (The notices of approval are attached hereto as Exhibits A and B, respectively.) The grant agreements were executed by the City on March 6 (*see* Exhibits C and D) and are now binding obligations of the United States under section 203 of the Act.

6. USEPA has thus evinced its approval of the City's two priority sewage treatment projects. But because of reduced allotments, the level of funding is inadequate to complete either project. In the case of Red Hook, the federal grant ($11 million) will permit only a token start toward completion of a $305.4 million project.

7. Because the City has been forced to resort to phased funding of its two priority projects, it is placed in the precarious position of expending local funds to pay the local share of the cost of each phase without assurance of continued federal funding to complete the project. By virtue of the reduction in allotments, the City must bear the risk of either being left with incomplete and useless sewage treatment plants or being forced to complete the plants without federal assistance.

8. Furthermore, phased funding will prevent the completion of either project within the time parameters established by sections 301 and 304 of the Act. In addi-

tion to the continuation of the pollution of the City's waters which will be caused by the construction delay, the City's failure to meet the Act's deadlines will subject the City to citizens' and government suits to enforce compliance with the Act. It is not speculative to speak of the possibility of such suits in light of similar action taken by the United States against the City under the Refuse Act and old Water Pollution Control Act (*see United States* v. *Lindsay, et al.*, 72 C 1362 (E.D.N.Y. 7/17/72).

9. It is evident, then, that the City has been directly injured by the Administrator's action. The City's two priority projects are approved for federal funding, but at amounts less than would have been available had the authorized sums been alloted.

/s/ Martin Lang
MARTIN LANG

Sworn to before me this 3rd day of April, 1973.

/s/ John Calia
JOHN CALIA
Notary Public
State of New York. No. 41-5573935. Queens County.
Certificate filed in New York County. Commission Expires March 30, 1974.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2466-72

[Filed May 8, 1973]

THE CITY OF NEW YORK, on behalf of itself and all other similarly situated municipalities within the State of New York, PLAINTIFF

THE CITY OF DETROIT, PLAINTIFF-INTERVENOR

v.

WILLIAM D. RUCKELSHAUS, as Administrator of the United States Environmental Protection Agency, DEFENDANT

ORDER

This action having come before the Court on defendant's motion to dismiss, the motions of the plaintiff and the intervening plaintiff for summary judgment, and plaintiff's motion to determine that this action may be maintained as a class action, and the Court having considered the pleadings, motions, oppositions, affidavits, and statements filed by the parties and having heard oral argument in open Court, and having found that there is no genuine issue as to any material fact, and having concluded that plaintiff is entitled to judgment as a matter of law, and for the reasons stated in the Opinion filed in this case, it is by the Court this 8th day of May, 1973,

ORDERED that defendant's motion to dismiss be, and the same hereby is, denied; and it is further

ORDERED that this action is to be maintained as a class action under Rule 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure on behalf of a class comprised of plaintiff and other municipalities similarly situated within the State of New York; and it is further

ORDERED that the motions of plaintiff and intervening plaintiff for summary judgment be, and they hereby are, granted; and it is further

ADJUDGED AND DECLARED that § 205(a) of the Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816, requires the defendant, as Administrator or Acting Administrator of the United States Environmental Protection Agency, to allot among the States $5 billion and $6 billion for the fiscal years 1973 and 1974, respectively; and it is further

ORDERED that the defendant and his subordinates be, and they hereby are, directed to annul and revoke by official act in writing the extant orders, regulations and other evidences of allotment under said Amendments of less than $5 billion and $6 billion for the fiscal years 1973 and 1974, respectively, and they are directed further to allot among the States, pursuant to said Amendments, the sum of $5 billion for the fiscal year 1973 and the sum of $6 billion for the fiscal year 1974.

/s/ Oliver Gasch
Judge

SUPREME COURT OF THE UNITED STATES

No. 73-1377

RUSSELL E. TRAIN, Administrator,
United States Environmental Protection Agency,
PETITIONER

v.

CITY OF NEW YORK, ET AL.

ORDER ALLOWING CERTIORARI—Filed April 29, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 73-1378 and a total of one hour is allotted for oral argument.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

CA 18-73-R

Jury demand date:

CAMPAIGN CLEAN WATER, INC.

vs.

ROBERT W. FRI, Acting Administrator
Environmental Protection Agency

Basis: Refusal by Govt. agency to allot authorized sum $11 Billion. 28 USC 1331 & 1361.

For plaintiff: Alfred Jerome Owings, Esq. 5421 Patterson Ave. City 23226. 288-4027.

Out-of-state counsel: Alan B. Morrison and W. Thomas Jacks, Suite 515, 2000 P St., N.W., Wash., D.C. 20036—phone: 202-785-3704.

For defendant: Harlington Wood, Jr., Asst. Atty. General and Brian P. Gettings, U.S. Atty., Ern. Dist. Va. and Harland F. Leathers, David J. Anderson, Dennis G. Linder, James R. Prochnow, Attorneys, Department of Justice.

Statistical Record	Costs	Date 1973	Name or Receipt No.	Rec.	Disb.
mailed	Clerk	1-15-73	FF	15.00	
		1-16-73	C/D59		15.00
mailed	Marshall				
Action:	Docket fee				
	Witness fees				
rose at:	Depositions				

Date	PROCEEDINGS
1973	
Jan. 15	Complaint filed and summonses issued.
Jan. 17	Marshal's return on summons as to all defendants listed, executed & filed.
March 19	Pltf's Motion for Summary Judgment with Supporting Memorandum of Points & Authorities filed.
March 19	Motion to dismiss filed by deft.
March 19	Brief in support of Deft's Motion to Dismiss filed.
March 30	Memorandum of Points & Authorities in Opposition to deft's Motion to Dismiss, filed by pltf.
April 4	Deft's Opposition to motion for summ. judgment filed, with supporting memorandum.
April 12	Order directing counsel to file such memoranda as they may deem appropriate with respect to the standing of plf. to maintain this action, ent. 4-12-73. Copies to counsel of record.
April 30	Plf's Memorandum in support of its standing to maintain this action, filed, with affidavit of Newton Ancarrow attached.
June 5	Memorandum of the court filed.
June 5	Order substituting Robert W. Fri, Acting Administrator of the Environmental Protection Agency, for William D. Ruckelshaus as the proper party deft; granting leave to plf. to proceed in this action on behalf of its members and those similarly situated in the Commonwealth of Va.; denying deft's motion to dismiss; granting plf's motion for summary judgment; it is declared that the announced policy of the Administrator to refuse to allot $6 billion of the designated $11 billion under S. 205 of the Federal Water Pollution Control

Date	PROCEEDINGS
1973	
	Act Amendments of 1972, 15USC1251 et seq, for the fiscal years 1973 and 1974 constitutes an abuse of discretion under the authority and powers conferred by the Act; said policy shall be and the same is hereby declared null and void; deft. directed to report to the Court within 10 days of this date those actions taken to conform the administration of the Act to the principles enunciated in the memorandum, ent. 6-5-73. Copies mailed all counsel of record.
June 6	Motion for stay of order of 6-5-73 until such time as the EPA has exhausted its appeals in this case, filed by deft.
June 8	Order denying motion of deft. for stay of order of 6-5-73 until they have exhausted appeals in this case; the deft. may move a Judge of the USCA for such stay as he or the Court may deem appropriate; staying order of 6-5-73 for a period of 10 days from 6-8-73, ent. 6-8-73. Copies to counsel.
June 18	Notice of appeal filed by defendant.
June 19	Defendant's motion for stay until 6-22-73, filed.
June 19	ORDER granting stay from order of 6-5-73 until 6-22-73, entered, filed.
June 20	Record on appeal, I vo., d41'd to Clerk, U.S.C.A.
July 12	Certified copy of order granting motion for a stay pending appeal, directing Clerk to calendar the appeal for the October term, re'cd from USCA, filed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Civil Action No. 18-73-R

[Filed Jan. 15, 1973, Clerk, U.S. Dist. Court, Richmond, Va.]

CAMPAIGN CLEAN WATER, INC.
Suite 605, Mutual Building, Richmond, Virginia 23219
PLAINTIFF

v.

WILLIAM D. RUCKELSHAUS, Administrator, Environmental Protection Agency, 1826 K Street, N.W., Washington, D.C. 20460, DEFENDANT

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action seeking to compel the defendant William D. Ruckelshaus, Administrator of the Environmental Protection Agency ("Administrator"), to perform his duty under section 205(a) of the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816, 837, (the "Act") to allot among the states the full sum authorized to be appropriated by section 207 of the Act for federal grants to states, municipalities, and other agencies for the construction of publicly owned waste treatment works.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1361.

3. The value of the amount in controversy exceeds $10,000.

4. Plaintiff Campaign Clean Water, Inc., a corporation incorporated under the laws of the Commonwealth of Virginia, was organized to promote the ecological and environmental advancement of Virginia. Its officers, directors, and financial contributors include Virginia residents who use the nation's waters for both sport and commercial fishing and for other recreation purposes.

In addition to its own organizational interests, Campaign Clean Water represents the interests of those Virginia residents in this action.

5. Section 210(g)(1) of the Act authorizes the Administrator to make grants to any state, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works.

Section 207 of the Act authorizes to be appropriated for the fiscal year ending June 30, 1973 ("fiscal 1973") a sum not to exceed $5 billion for, *inter alia*, carrying out section 201(g)(1). Section 207 also authorizes to be appropriated for the fiscal year ending June 30, 1974 ("fiscal 1974") a sum not to exceed $6 billion for the same purposes.

7. Section 205 of the Act states that sums authorized to be appropriated by section 207 for fiscal 1973 shall be allotted by the Administrator among the states within thirty days after the enactment of the Act, and that such sums shall be allotted in accordance with regulations promulgated by the Administrator in a prescribed ratio based on the treatment works construction needs of the States.

8. On November 28, 1972, defendant announced that only $2 billion of the $5 billion authorized to be appropriated by section 207 of the Act for fiscal 1973 and only $3 billion of the $6 billion authorized to be appropriated for fiscal 1974 would be allotted by him among the states and would be available for waste treatment works construction grants. Defendant stated that he was withholding the remaining $6 billion of allotments from the states at the direction of the President in keeping with the President's recently announced determination to cut federal spending for anti-inflationary reasons.

9. The action of the Administrator in refusing to allot among the states the full sum authorized to be appropriated by Congress in section 207 of the Act for fiscal 1973 and 1974 was unlawful, was outside the scope of his discretion and authority, and was a violation of defendant's duties to plaintiff and those persons who plaintiff represents, in that (a) the defendant lacks the discretion to refuse to allot among the states the full sums authorized by Congress; or, alternatively, (b) the defendant abused whatever limited discretion he possesses by withholding a greater amount of funds than contemplated by the Congress under the Act.

10. The action of the defendant complained of in paragraph 8 significantly affects the interests of plaintiff and those persons it represents, in that it will delay the achievement of the restoration and maintenance of the chemical, physical, and biological integrity of the nation's waters, which is the objective of the Act, as set forth in section 101 thereof.

WHEREFORE, plaintiff prays for an order (1) declaring the action of the Administrator herein complained of to be unlawful and outside the scope of his discretion and authority; (2) directing the defendant to allot among the states the full sums of $5 billion and $6 billion authorized to be appropriated by section 207 of the Act for fiscal years 1973 and 1974, respectively; (3) granting such other and further relief as the Court may deem just and proper, including the retaining of jurisdiction to ensure that defendant does not, by other unauthorized means, prevent or defer the obligation by states, munipalities, and other authorized agencies of alloted sums.

Dated: Richmond, Virginia
January 15, 1973

/s/ Alfred Jerome Owings
ALFRED JEROME OWINGS
5421 Patterson Avenue
Richmond, Virginia 23226
(703) 288-4027

/s/ Alan B. Morrison
ALAN B. MORRISON

/s/ W. Thomas Jacks
W. THOMAS JACKS
Suite 515
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for the Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 18-73-R

CAMPAIGN CLEAN WATER, INC., PLAINTIFF

v.

WILLIAM D. RUCKELSHAUS, DEFENDANT

MOTION TO DISMISS

Defendant William D. Ruckelshaus, Administrator of the Environmental Protection Agency, by his undersigned attorneys, hereby respectfully moves the Court, pursuant to Rule 12 of the Federal Rules of Civil Procedure, to dismiss this action. The grounds for this Motion are that the Court lacks jurisdiction over the subject matter of this suit and that the Complaint fails to state a claim upon which relief can be granted.

In support of this Motion, the Court is respectfully referred to the Brief filed herewith.

Respectfully submitted,

HARLINGTON WOOD, JR.
Assistant Attorney General

BRIAN P. GETTINGS
United States Attorney

HARLAND F. LEATHERS

DAVID J. ANDERSON

DENNIS G. LINDER

JAMES R. PROCHNOW

Attorneys, Department of Justice
Attorneys for Defendant

SUPREME COURT OF THE UNITED STATES

No. 73-1378

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, PETITIONER

v.

CAMPAIGN CLEAN WATER, INC.

ORDER ALLOWING CERTIORARI—Filed April 29, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The case is consolidated with No. 73-1377 and a total of one hour is allotted for oral argument.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 548850 289

Supreme Court, U. S.
FILED
APR 11 1974
MICHAEL RODAK, JR., CLERK

(41472)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1377

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

CITY OF NEW YORK, ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, AND THE CITY OF DETROIT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT THE CITY OF NEW YORK

ADRIAN P. BURKE,
Corporation Counsel,

JOHN R. THOMPSON,
Special Assistant
Corporation Counsel,

GARY MAILMAN,
ALEXANDER GIGANTE, JR.,
Assistant Corporation Counsel,
Attorneys for Respondent
The City of New York,
Municipal Building,
New York, New York 10007.
(212) 566-2091

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1377

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

CITY OF NEW YORK, ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, AND THE CITY OF DETROIT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT THE CITY OF NEW YORK

Supplementary Statement

This case is a continuation of a controversy between the Congress and the Executive branch over the appropriate size of a program to clean up the nation's waterways and the manner in which such a program should be funded. In 1971 the Administration proposed a $6 billion program with the customary authorization-appropriation funding procedure. Extensive hearings on the subject were held by

committees in both houses of Congress. Ultimately separate bills were passed in the House and Senate which each authorized a level of funding substantially greater than that proposed by the Administration.

After many months of discussion the Conference Committee reported the Act in its present form. It authorizes a total of $18 billion for the fiscal years 1973 through 1975 to fund a sewage treatment plant construction grant program. The authorized sums are made available to the States by an allotment procedure; grants are to be made from the allotments through the exercise of special contract authority by the Administrator, rather than by the customary authorization-appropriation method.

Congress passed the Act on October 4, 1972. The President vetoed it on October 17, 1972 on the ground that it provided for "the commitment" of a "budget-wrecking" sum. The Senate overrode the veto the same day and the House followed suit the next day. On November 22, 1972 the President directed the Administrator to allot among the States only $5 billion of the $11 billion that the Act authorized for fiscal years 1973 and 1974. The Administrator complied with the President's direction on December 8.*

The respondent City then brought suit. It has been the City's position that the dispute between Congress and the Executive branch as to the level of funding had been, in effect, resolved by the override of the veto and that the Act requires the Administrator to allot the full sums authorized. The Government has countered by adhering to

* On January 15, 1974 the Administrator allotted $4 billion of the $7 billion authorized for fiscal year 1975 (Petition, p. 5). The Solicitor General includes the $3 billion difference in his conclusion that $9 billion is involved in the case (Petition, p. 6).

the argument that certain changes in the Act made by the Conference Committee indicated a congressional intent that the Administrator could allot less than the sums authorized. Both the Court of Appeals and the District Court rejected the Administrator's argument. Those courts found, instead, that the changes made by the conferees, as explained during the debates in both houses, were merely intended to make clear that the Administrator had some power to control the rate of spending under the Act at the point when funds were actually obligated, namely, when the Administrator exercised his authority to enter into grant contracts. Neither court found any congressional intent to permit the Administrator to reduce the total amount available for obligation by allotting less than the full sums authorized.

It is apparent that a clear view of the funding procedure established in the Act is essential to consideration of whether certiorari should be granted. The legislative history shows that this funding procedure was chosen with deliberation to serve two purposes: to make sure the full amounts authorized would be available for ultimate spending and to inform the States (and through them, their local governments), at an early stage, of the scope of the waste treatment programs they could prudently plan.

The adopted procedure involves six separate steps:* (1) congressional authorization to appropriate funds, which sets a total ceiling on the amounts available for eventual obligation and spending; (2) allotment by the Administrator of the authorized totals among the States, pursuant to

* Step (1) is provided for in §207; Step (2) in §205; Steps (3) and (4) in §§203 and 204; Steps (5) and (6) follow as a matter of regular governmental procedure.

a statutory formula, which establishes State-by-State ceilings; (3) submission by local governments, through their States, of specifications and cost estimates for each proposed waste treatment project; (4) review by the Administrator of each submission and, upon his approval, a federal commitment (obligation) to pay the 75% federal share of the particular project; (5) appropriation of funds to liquidate obligations as they fall due; and (6) actual disbursement of funds.

The Petition omits the third step and does not mention the lengthy process of State and municipal planning which must necessarily precede it. The location, capacity, technology, preliminary and final design and estimated costs of waste treatment plants must be determined by local governments and coordinated on a State-wide basis before applications for federal grants can be submitted for the Administrator's approval. In addition, plans must be made and authority established for financing the non-federal 25% of construction cost and the projected costs of operation and maintenance. As the District Court pointed out, "[t]he seriousness of the planning problem was understood by Congress" and Congressman William Harsha, one of the managers of the bill, expressly addressed himself to it in opposing a proposed amendment which would have substituted the normal appropriations process for contract authority funding (59A, 65A-66A).*

* References are to the combined Appendix the Solicitor General chose to submit, presumably with the Court's approval, in this and another case arising out of the same statute but involving different legal issues.

Reasons the Petition Should Be Denied

The Solicitor General's four reasons for granting the writ all proceed from a false premise: that allotment of the full amounts authorized precludes any Executive control over actual spending. As the Supplementary Statement above and the opinion of the Court of Appeals make clear, that is just not so. Spending occurs long after allotments are made and is subject to review and approval of detailed submissions for individual projects. Whatever Executive control over the rate of actual spending was intended, it can be exercised at a later stage and does not require frustration of the congressional scheme at its outset.

All four of the reasons appear to be advanced in support of the Rule 19 guideline explicitly stated in only the first reason: that the decision below "presents an important question that this Court should review" (Petition, p. 6). Undeniably the case is important. However, once the misconceived premise is recognized, it is clear that the importance is limited to the water pollution control program. And the legal question presented is simply one of statutory construction (see the Court of Appeals' "Conclusion" at 34A, including fn. 39). Moreover, the question is not one which will recur and on which the lower federal courts will require guidance in the administration of the Act. And no other Act is likely to have exactly the same wording or can have the same legislative history. Furthermore, a reading of the opinion below leaves no doubt but that the Court of Appeals approached the statutory question in the approved way, placed the critical statutory provi-

sions in the context of the entire Act, carefully analyzed the relevant legislative materials and reached a sound conclusion.

In short, there is no "special and important" reason for the Court to review the Court of Appeals' decision. But, even if the Court decides to grant certiorari, this case could well be disposed of summarily because of the obvious correctness of the decision below. *See, e.g., United States* v. *Lane Motor Co.*, 344 U.S. 630.

(1)

In support of his first reason for granting the writ the Solicitor General makes three statements: (i) the decision below will require the Administrator immediately to allot $9 billion among the States; (ii) the case has "important ramifications" for the power of the Executive to control the Government's spending in that it encroaches upon a discretion Congress intended the President to have; and (iii) the same issue is pending in cases before three other Circuits.

The first of these statements indicates only that the decision requires bookkeeping which, under the statutory scheme, will make a sum of money available for possible ultimate spending. The Solicitor General is careful not to deny a congressional intent that the full amount be ultimately spent. Thus even in the Government's view this case only involves the mechanics affecting the rate at which that sum will be spent.

With regard to the second statement, it completely fails to articulate the "ramifications" this case has for the power of the Executive to control the rate of

spending.* Since the Government expressly conceded below** that Congress could constitutionally direct the Executive to allot and that allotment does not commit the Government to obligation, it is clear that there are no such "ramifications." The Petitioner's reference (p. 6) to the congressional intent is but a bare assertion that the court below was wrong.

As to the cases in other Circuits, the Administrator is a defendant in all of them and to the best of our knowledge took no action to stay all but a pilot case pending final determination of the issue. Under these circumstances it would not seem appropriate for the Court to give any weight to such avoidable multidistrict litigation. In the event certiorari should be denied, it would appear that the other cases would not continue.†

(2)

The Solicitor General's second reason is that if the decision below stands, "[a] court might" at some future time hold that the Administrator lacked power to control the rate of spending at the later obligation stage—the stage at which the court below recognized the Administrator would

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* After initial ambivalence the Government abandoned the argument that, in the event the Act was interpreted to require allotment, a constitutional question was raised as to the power of Congress to direct such action by the Executive branch. *See* the City's *amicus curiae* brief in *Georgia* v. *Nixon, et al.*, No. 63, Original, *motion for leave to file bill of complaint denied* 414 U.S. 810; and p. 34A n. 39.

** *See* 34A n. 39.

† The order in this case requires allotment of the full sums authorized for fiscal years 1973 and 1974. Hence, if certiorari is denied and the Court of Appeals order goes into effect, there would seem to be no reason for other courts to continue litigation seeking the same relief.

have some discretion to control spending. In that event, the Petition states, the Administrator would end up with no control over spending. The power of this Court to review any such decision a court "might" render would seem to be ample protection for the Government.

(3)

As a third reason for granting the writ, the Solicitor General recites the legislative changes made in Conference and says the Court of Appeals made no effort to explain them. On the contrary, that court dealt at length with those very changes. With painstaking care it analyzed them in the context in which they were made (11A, 19A-25A).

(4)

The Solicitor General's final point is difficult to follow. He seems to assert that if, at some future date, the Administrator's power to control the rate of spending is limited by court decision (*i.e.* a decision "a court might" render, as referred to in (2) above), it would at that time be apparent that the instant suit should have been barred by the doctrine of sovereign immunity. He argues also that this case is subject to the defense of sovereign immunity since the ultimate effect of allotment is expenditure.

We do not understand the petition to urge a grant of certiorari to review the rejection below of the sovereign immunity argument except upon the hypothesis as to what "[a] court might" some day decide about the power to control the rate of spending at the obligation stage. In any event, the District Court's opinion on sovereign immunity (63A-64A), which the Court of Appeals adopted (10A-11A), clearly followed the governing decisions by this Court.

CONCLUSION

The petition for certiorari should be denied, or, if certiorari is granted, the decision below should be summarily affirmed.

April, 1974

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Nos. 73-1377 and 73-1378

In the Supreme Court of the United States

OCTOBER TERM, 1973

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, ET AL.

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CAMPAIGN CLEAN WATER, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE FOURTH CIRCUITS

BRIEF FOR THE PETITIONER

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE FOURTH CIRCUITS

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals in *City of New York,* No. 73–1377 (Pet. App. A, pp. 1A–34A), is

reported at 494 F.2d 1033. The opinion of the district court (Pet. App. E, pp. 59A–78A) is reported at 358 F. Supp. 669.

The opinion of the court of appeals in *Campaign Clean Water,* No. 73–1378 (Pet. App. B, pp. 35A–53A), is reported at 489 F. 2d 492. The opinion of the district court (Pet. App. F, pp. 79A–100A) is reported at 361 F. Supp. 689.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit in *City of New York* was entered on January 23, 1974 (App. C, pp. 55A–56A). The judgment of the Court of Appeals for the Fourth Circuit in *Campaign Clean Water* (Pet. App. D, pp. 57A–58A) was entered on December 10, 1973.

The petitions for writs of certiorari were filed on March 11, 1974, and were granted on April 29, 1974. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. The question presented in *City of New York* is whether Sections 205(a) and 207 of the Water Pollution Control Act Amendments of 1972 authorize the Administrator, acting at the direction of the President, to control the rate of spending under the program by alloting less than the full amounts authorized by the Congress.

2. The question presented in *Campaign Clean Water* is whether the court of appeals, upon recognizing that the question whether the Administrator has discretion to allot less than the amounts authorized was no longer an issue in the case, should have directed the district court to dismiss the complaint instead of remanding the case for a hearing *de novo* to determine whether the Administrator abused his discretion in making the particular allotments.

STATUTES INVOLVED

The Administrative Procedure Act, in the introductory clause to Section 10, 60 Stat. 243, now 5 U.S.C. 701 (a)(2), provides:

> This chapter applies, according to the provisions thereof, except to the extent that * * * agency action is committed to agency discretion by law.

The pertinent portions of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (33 U.S.C. (Supp. II) 1251 *et seq.*) provide:

> *Sec. 205.* (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of

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all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92–50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

(b) (1) Any sums allotted to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

(2) Any sums which have been obligated under section 203 and which are released by the payment of the final voucher for the project shall be immediately credited to the State to

which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immediately available for obligation in the same manner and to the same extent as such last allotment.

* * * * *

Sec. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

STATEMENT

These actions seek to compel the Administrator of the Environmental Protection Agency to increase allotments he has made under Title II of the Water Pollution Control Act Amendments of 1972 ("the Act"). Allotment is a process under the statute by which the Administrator allocates from the sums authorized particular amounts to the eligible jurisdictions[1] pursuant to a percentage formula specified by Congress.

1. THE STATUTORY SCHEME

Title II creates a federal grant program under which the federal government pays 75 percent (Section 202 (a)) of the cost of building approved sewage treatment facilities. The granting of such funds takes place in several stages. First, the Congress authorizes appropriations for such grants (Section 207). Then the

[1] These are the states, the District of Columbia, and certain territories. See Table I, *infra*, p. 49.

Administrator makes allotments from the authorized amounts among the states pursuant to specified percentage formulas (Section 205). The Administrator then may approve qualified projects within the state out of each state's allotment (Sections 203, 204). Approval of a project constitutes an obligation of the United States. Finally, as grantees make expenditures on the approved projects, the sums due under the obligations are appropriated by the Congress and paid (Section 203(b)).

Sections 205 and 207 of the Act are directly involved in these cases. Section 207 authorizes appropriations "not to exceed" $5 billion for fiscal year 1973, $6 billion for fiscal year 1974 and $7 billion for fiscal year 1975. Section 205 provides that the sums authorized by Section 207 "shall be allotted" by the Administrator among the states. The Administrator has construed the statutes as empowering him to control the rate of spending by making allotments of less than the full amounts authorized by Section 207.

On November 28, 1972, the Administrator, acting pursuant to the direction of the President, allotted $2 billion for fiscal year 1973 and $3 billion for fiscal year 1974 (Pet. App. A, p. 7A). These actions are challenged in this litigation. On January 15, 1974, the Administrator, in an action not directly challenged here, allotted $4 billion out of the $7 billion authorized for fiscal year 1975.

As of May 31, 1974, not all of the sums allotted in November, 1972 had been obligated; substantially all of the $4 billion allotted in January, 1974 remained

available (see Table I, *infra*, p. 49). Only after the allotments already made have been fully obligated, and only if the President then decides not to authorize immediately further allotments, will the allotments here involved have any substantial effect on the rate of obligation and subsequent expenditure under the program.

Thus, the reduction in allotments here challenged has not in fact significantly reduced the rate of obligation and subsequent expenditure under this program. Rather, it has acted as a pre-set limit on obligation under the program, always subject to subsequent upward adjustment in response to later developments.

2. THE PARTICULAR CASES

A. CITY OF NEW YORK

On December 12, 1972, the City of New York filed a complaint in the United States District Court for the District of Columbia alleging that under Section 205 of the Act the Administrator was required to allot all sums authorized by Section 207—an additional $3 billion for 1973 and $3 billion for 1974 (App. 6–14).

The district court held that the Act imposed a mandatory duty to allot (Pet. App. E, p. 77A) and that control over the rate of spending should be exercised at the obligation, not the allotment stage (Pet. App. E, p. 72A). The court of appeals affirmed, holding that Section 205(a) imposes a mandatory duty on the Administrator to allot all sums authorized by Section 207 (Pet. App. A, p. 34A).

B. CAMPAIGN CLEAN WATER

On January 15, 1973, the plaintiff, an organization of Virginia ecologists, filed a complaint in the United States District Court for the Eastern District of Virginia alleging that the defendant Administrator had a duty to allot all sums authorized by Section 207 or, alternatively, that his failure to allot more than 45 percent of the funds authorized was an abuse of discretion (App. 36–37). The district court held that the Administrator had discretion under the statute to allot less than the full amount authorized (Pet. App. F, pp. 95A–96A), but that his decision to allot only 45 percent violated the Act (Pet. App. F, p. 99A).

On appeal, the court of appeals, noting that the plaintiff conceded that the Administrator had discretion to allot less than the amounts authorized by Congress (Pet. App B, p. 39A), reversed the holding of violation of the Act on the ground that the record does not support this finding of "fact" (Pet. App B, pp. 47A–53A). The court of appeals held, however, that the exercise of the Administrator's discretion is subject to judicial review by a hearing *de novo* in the district court and remanded the case to that court for proceedings to determine whether there had been an abuse of discretion (Pet. App. B, p. 53A).

SUMMARY OF ARGUMENT

I

The Administrator's interpretation of Sections 205 and 207 as authorizing him to allot less than the

total sums authorized to be appropriated is supported by the language of the statute and its legislative history. These sections reflect two initial changes made by the conference committee: It eliminated the word "all" before the words "sums authorized to be appropriated pursuant to Section 207," which the Administrator is directed to allot; and it added the words "not to exceed" before the specific amounts authorized to be appropriated in Section 207.

Congressman Harsha, the floor manager of the bill, explained that these changes were intended to emphasize "the President's flexibility to control the rate of spending". 118 Cong. Rec. (daily ed.) H 9122. Similar explanations of the changes were given by the Senate floor managers. After the President vetoed the bill, Congress overrode the veto. In the debates on such overriding, the President's authority to control the rate of spending was again stressed. The legislative history thus shows that both the House and the Senate, on the original enactment of the bill and in overriding the Presidential veto, were fully aware that the Act gave the President authority to control the rate of spending because of the discretionary language employed in Sections 205 and 207.

The court of appeals failed to recognize that the rate of spending may be controlled through the allotment process as well as through the obligation process, and that there is no practical difference between exercising such control at the two stages. The court of appeals believed that control of the rate of spending

at the allotment stage could thwart the congressional intent that $18 billion be expended for water pollution control construction projects (Pet. App. A, pp. 19A–25A). The court unwarrantedly assumed that sums not allotted initially under Section 205 would "lapse" and be irretrievably lost to the States. There is nothing in the statute, however, which indicates any congressional intention to preclude the Administrator from making subsequent allotments until the entire $18 billion has been spent. The discretion that Congress gave the President acting through the Administrator, to control the rate of spending, may be exercised at the allotment stage. Such control may be exercised in the interest of overall government fiscal policies that are not related to the particular program involved.

II

In *Campaign Clean Water, Inc.*, the court of appeals should have directed the district court to dismiss the complaint once the plaintiffs had conceded that the Administrator has discretion in making allotments. The district court has no jurisdiction to determine upon remand whether the Administrator had abused his discretion in allotting only 45 percent of the funds authorized. Sovereign immunity bars litigation of the claim because the ultimate effect of the relief sought—the allotment of additional sums to the states—would require the expenditure of the funds of the United States. *Hawaii* v. *Gordon*, 373 U.S. 57; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337

U.S. 682. The Administrative Procedure Act does not waive sovereign immunity, and does not of itself confer jurisdiction. *Blackmar* v. *Guerre*, 342 U.S. 512, 515–516.

The Administrative Procedure Act is inapplicable because the Administrator's action was committed to agency discretion by law. 5 U.S.C. 701(a); *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317–319. The Water Pollution Control Amendments contain no criteria or standards governing the Administrator's exercise of his discretion. This is one of the rare instances where administrative action is precluded from judicial review because "there is no law to apply." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410. The inquiry which the court of appeals directed the district court to make would require the court to decide a political question, involving managerial judgments by the President, which is not meet for judicial resolution.

ARGUMENT

INTRODUCTION

The Administrator interprets Sections 205 and 207 together as authorizing him to allot less than the total sums authorized to be appropriated. In his view, those sections impose a limit upon the amount he can allot—it cannot exceed the amount authorized—but do not require him to allot immediately all that has been authorized.

By allotting less than the full amounts authorized, the Administrator is able to reduce the funds avail-

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able during a particular time period, *i.e.*, to reduce the rate of spending. This action was taken pursuant to a direction of the President, who, acting with the advice of the Office of Management and Budget, has the responsibility to evaluate the competing needs of this program and other claims on the limited total federal financial resources from which all expenditures are made.

At the time the original allotments were made, the Executive Branch had not considered whether further allotments could be made at later times until the full $18 billion was exhausted, *i.e.*, whether the allotment authority continued after the particular specific year for which the appropriation was authorized. Since it was assumed that Congress would be willing to authorize additional sums, the question whether such authorization was required before additional allotments could be made appeared to be of little practical significance. However, in response to a question from Senator Muskie to the Deputy Attorney General during hearings of the Ad Hoc Subcommittee on Impoundment of Funds on February 6, 1973, the Department of Justice studied this issue.

The Department concluded that the proper construction of the statute—the one which best accommodates its language and its legislative history—is that additional allotments may be made without further congressional authorization, at least until the time when reallotment of funds not utilized was required under Section 205(b).[2] The Department reported its conclusion to the Senate Committee on February 26, 1973,[3] but did not so inform the district courts in this litigation. The Department subsequently advised the Court of Appeals for the Eighth Circuit, in a supplemental brief filed in *State of Minnesota* v. *United States Environmental Protection Agency*, No. 73-1446, that the power to allot continues until the full $18 billion has been exhausted. The Executive Branch is now administering the statute under that construction of these sections.

Although the district court and the court of appeals in the *City of New York* case imply that the Administrator has authority to control the rate of spending at the obligation stage of this program (Pet. App. E, p. 72A; Pet. App. A, p. 23A), the government's present plan is to exercise that control only at the allot-

[2] Under Section 205(b) funds allotted but not obligated are to be reallotted one year after the end of the fiscal year for which authorized pursuant to the most recent allotment formula. That means authorized sums not obligated are withdrawn from all jurisdictions and the total then reallotted. This has two functions: (1) it ensures that the relative share of each jurisdiction is determined by more recent information on need; and (2) it, to some extent, transfers unused authorization from jurisdictions that have not made full use of their allotments to those that have. It is the position of the government that supplemental allotments made after the date for reallotment should be allotted according to the reallotment formula.

[3] Joint Hearings before the Ad Hoc Subcommittee on Impoundment of Funds of the Senate Committee on Government Operations and the Subcommittee on Separation of Powers of the Senate Judiciary Committee, on Impoundment of Appropriated Funds by the President, S. 373, 93rd Cong., 1st Sess., 840-841.

ment stage. This procedure enables the states in their planning to rely on allotments once they have been made. However, if this Court should hold that the entire amount authorized must be allotted at the outset, the Administrator, in consultation with the President, will then have to decide whether to exercise his authority to impose comparable obligation controls for the same purpose.

In this consolidated brief we will first argue the question presented in *City of New York:* Does Section 205(a) require allotment of the full amounts authorized? In our view, if it does, then allotment is a ministerial act and the district courts have jurisdiction to order that it be done.

We will then argue the question presented in *Campaign Clean Water:* If discretion to allot less than the full amounts authorized exists, as was conceded by the plaintiffs and accepted by the court in that case, do the district courts have jurisdiction to review the exercise of that discretion?

I

SECTIONS 205(A) AND 207 OF THE ACT AUTHORIZE THE ADMINISTRATOR TO CONTROL THE RATE OF SPENDING UNDER THE ACT BY ALLOTTING LESS THAN THE FULL AMOUNTS AUTHORIZED TO BE APPROPRIATED

A. THE LANGUAGE OF SECTIONS 205(A) AND 207 DOES NOT REQUIRE THE ADMINISTRATOR TO ALLOT ALL THE AMOUNTS AUTHORIZED

Section 205(a) of the Act provides that "Sums authorized to be appropriated pursuant to section 207 for each fiscal year * * * shall be allotted by the

Administrator." Section 207 provides that, with respect to the years involved in this litigation, "There is authorized to be appropriated * * * not to exceed" $5 billion for 1973 and "not to exceed" $6 billion for 1974. The obligation to allot in Section 205(a) thus is defined by the appropriation authorization in Section 207, and the latter does not specify a specific amount but merely sets a maximum limit.

Section 205(a) does not require the Administrator initially to allot all the moneys authorized to be appropriated by Section 207; it merely directs him to allot "sums" so authorized. Section 207 provides broad discretion with respect to the amount authorized to be appropriated. In view of the interrelationship and parallel thrust of the two sections, we submit that Section 205(a) similarly gives the Administrator broad discretion to determine how much of the amounts authorized to be appropriated he will initially allot.

B. THE LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 SHOWS THAT CONGRESS INTENDED TO GIVE THE PRESIDENT, ACTING THROUGH THE ADMINISTRATOR, AUTHORITY TO CONTROL THE RATE OF SPENDING

The House bill (H.R. 11896, 92d Cong., 2d Sess.) provided in Section 205(a) that "all sums authorized * * * pursuant to section 207" shall be allotted by the Administrator, and in Section 207 specified the exact dollar amounts authorized to be appropriated—$5 billion for fiscal year 1973, $6 billion for fiscal year 1974 and $7 billion for fiscal year 1975. The Senate bill (S. 2770, 92d Cong., 1st Sess.) also provided in Section 205(a) that "all sums * * * authorized * * * shall be allocated

[allotted]" and Section 207(b)(1) authorized "not to exceed" an "aggregate of $12 billion" prior to July 1, 1976. Because of these and other differences in the two bills, the legislation was sent to conference on March 29, 1972, after passage of the House bill. After extensive deliberation, the conference committee reported an amended bill six months later on September 28, 1972.[4]

The Committee made two changes, the so-called "Harsha Amendments," which are critical to the question before the Court. First, it eliminated the word "all" from the requirement in Section 205(a) that the Administrator allot "all sums authorized" by Section 207. Second, it adopted the phrase "not to exceed" from the Senate bill as a qualification upon the amounts authorized to be appropriated by Section 207.

Congressman Harsha, the House floor manager of the bill and the author of the amendments, explained that "the elimination of the word 'all' before the word 'sums' in section 205(a) and insertion of the phrase 'not to exceed' in section 207 was intended by the managers of the bill to emphasize the President's flexibility to control the rate of spending." 118 Cong. Rec. (daily ed.) H 9122. He continued (*ibid.*):

[4] Senator Muskie, a Member of the Conference Committee, stated "I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. The difficulty in reaching agreement on this legislation has been matched only by the gravity of the problems with which it seeks to cope." 118 Cong. Rec. (daily ed.) S 16869.

> Furthermore, let me point out, the Committee on Public Works is acutely aware that moneys from the highway trust fund have been impounded by the Executive. Expenditures from the highway trust fund are made in accordance with similar contract authority provisions to those in this bill. Obviously expenditures and appropriations in the water pollution control bill could also be controlled. However, there is even more flexibility in this water pollution control bill because we have added "not to exceed" in section 207, as I indicated before.
>
> Surely, if the administration can impound monies from the highway trust fund which does not have the flexibility of the language of the water pollution control bill, it can just as rightly control expenditures from the contract authority produced in this legislation by that same means.[5]

The same view was expressed in the subsequent colloquy among Representative Harsha, Representative Jones, the Chairman of the House Conferees, and Representative Ford. In response to a statement from

[5] The fact that the Court of Appeals for the Eighth Circuit in *State Highway Commission of Missouri* v. *Volpe*, 479 F. 2d 1099, subsequently held that the highway statute does not authorize the obligation of lesser amounts than those allotted does not undermine the significance of the references to highway impounding in the legislative history. The Members of Congress who referred to highway impounding were referring to the practice (which, in spite of an adverse district court decision, 347 F. Supp. 950 (W.D. Mo., 1972)), they apparently still assumed to be proper as an example of the type of control the Executive Branch could exercise over spending under the Water Pollution Control Act Amendments.

Representative Ford that it was "vitally important that the intent and purpose of section 207 is spelled out in the legislative history here in the discussion on this conference report," Mr. Harsha stated:

> I do not see how reasonable minds could come to any other conclusion than that the language means we can obligate or expend up to that sum—anything up to that sum but not to exceed that amount. Surely, if the Executive can impound moneys under the contract authority provision in the highway trust fund, which does not have the flexible language in this bill, they could obviously do it in this instance.

Mr. Jones stated that he agreed with Mr. Harsha, pointing out that the latter "offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio (Mr. Harsha)."

Mr. Ford then stated:

> Mr. Speaker, this clarifies and certainly ought to wipe away any doubts anyone has. The language is not a mandatory requirement for full obligation and expenditure up to the authorization figure in each of the 3 fiscal years. [118 Cong. Rec. (daily ed.) H 9123.]

The discussion of the conference bill in the Senate similarly shows a recognition that the changes made in Sections 205(a) and 207 were intended to give the Executive Branch power to control the rate of spending. In explaining these two changes Senator Muskie,

although describing the change in Section 205(a) as providing that " 'all' sums authorized to be obligated need not be committed, though they must be allocated," stated that the changes in the two sections "were suggested to give the administration some flexibility concerning the obligation of construction grant funds" (118 Cong. Rec. (daily ed.) S 16871). Senator Cooper, a Senate conferee, noted that the funding of the legislation would total "over $24 billion—subject to the usual presidential responsibility for evaluating these needs in relation to other national priorities." 118 Cong. Rec. (daily ed.) S 16881. Senator Nelson stated, with respect to expenditure controls: "Only if the President's Office of Management and Budget or the Congress specifically directed otherwise would the money not be available at the levels in the legislation, according to my understanding." 118 Cong. Rec. (daily ed.) S 16888.

The President vetoed the bill, stating in his veto message that it would lead to excessive spending.* 118 Cong. Rec. (daily ed.) H 10266. The Congress then passed the bill over the veto.

In the Senate debates on overriding the veto, Senator Muskie challenged the President's view that the bill would lead to excessive spending, stating:

> [T]he President is in a position to control the amount of such authority that is used by the Administrator of EPA, and probably the Office of Management and Budget as well.

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*The Administration had recommended expenditures of $6 billion. The Bill provided for an $18 billion grant program as well as $6 billion in other expenditures, a total of $24 billion.

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> May I point out to the Senator that in the language of the authorization are the words "not to exceed." Obviously, those are words of control [118 Con. Rec. (daily ed.) S 18550–18551.]

Senator Cooper reviewed the history of the legislation at some length and explained that the conference amendments had been expressly intended to offset the $18 billion figure adopted in the final bill by giving the President the "option of impoundment" (118 Cong. Rec. (daily ed.) S 18551). Likewise, the following statement of Senator Baker, also a conferee, was read to the Senate by Senator Muskie (118 Cong. Rec. (daily ed.) S 18547):

> [T]he Congress has gone out of its way to make it clear to the President that the funds authorized by the water pollution bill did not have to be spent in their entirety.

It was on the basis of these statements of the President's authority to control spending that the Senate overruled the veto.

In the House debates on overriding the veto the same point was made. Representative Harsha stated (118 Cong. Rec. (daily ed.) H 10268):

> [W]e have emphasized over and over again that if Federal spending must be curtailed, and if such spending cuts must affect water pollution control authorizations, the administration can impound the money.
>
> I want to point out that the elimination of the word "all" before the word "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207 was intended to emphasize the President's flexibility to control the rate of spending.

Similarly, Representative Clausen, also a conferee, stated that it was "unfortunate that the President felt that he had to veto this bill" because of "his concern for the task he has of holding the reins on the Federal budget," since the effect of the Harsha amendments in eliminating the word "all" in Section 205(a) and the addition of the words "not to exceed" in Section 207 "gave the President the authority and the flexibility he needs to control the rate of spending" (118 Cong. Rec. (daily ed.) H 10272). In his closing remarks, just before the House voted to override the veto, Representative Clausen stated:

> It [should] have been abundantly clear that the President has the authority to control the rate of spending. This was the clear intent of the managers. [*Ibid.*]

This legislative history shows that both the House and the Senate, on the original enactment of the bill and in overriding the Presidential veto, were fully aware that the bill that was enacted gave the President full authority to control the rate of spending. The elimination of the word "all" from Section 205 and the addition of the words "not to exceed" in Section 207 were frequently described together as the means by which authority to exercise that control was assured. As we now show, such control may be exercised by allotting less than the total amounts authorized to be appropriated.

C. THE AUTHORITY TO CONTROL THE RATE OF SPENDING MAY BE EXERCISED BY ALLOTTING LESS THAN THE AMOUNTS AUTHORIZED TO BE APPROPRIATED

The court of appeals in *City of New York* concluded (Pet. App. A, pp. 19A, 23A), on the basis of its reading of the legislative history, that "while the Administrator might control the timing of future spending through delay of *obligation,* he must fully allot" and that "the amendments were intended to grant the executive discretion in the *obligation* phase, not in the allotment phase" (emphasis in original). As shown above, however, the legislative history does not support this conclusion. Indeed, the action of the conference committee, discussed above (pp. 15–16), in deleting the word "all" from the requirement in Section 205(a) for allotment of "sums authorized" by Section 207, supports the contrary conclusion. Virtually all of the discussion upon which the court of appeals relied was directed to the question whether the Executive Branch could control the rate of spending, and did not focus upon the stage at which such control would be exercised.

It is significant that those courts that have rejected the government's position in this case—following the opinion of the district court in *City of New York*[7]—

[7] *City of New York* in the court of appeals (Pet. App. A); *State of Minnesota* v. *Fri*, D. Minn., No. 4–73, Civ. 133, June 25, 1973; *Martin-Trigona* v. *Ruckelshaus*, N. D. Ill., No. 72–C–3044, June 29, 1973; *State of Texas* v. *Ruckelshaus*, W. D. Tex., C. A. No. A–73–CA–38, October 2, 1973; *State of Florida* v. *Train*, N. D. Fla., Civ. No. 73–156, February 25, 1974; *State of Maine* v. *Train*, D. Maine, Civ. No. 14–51, June 21, 1974; *State of Ohio* v. *Environmental Protection Agency, et al.*, N. D. Ohio, Nos. C. 73–1061 and C. 74–104, June 26, 1974.

have offered no explanation for the deletion of the word "all" from Section 205. But the two courts that attached any meaning to this change found that the power to control the rate of spending could properly be exercised at the allotment stage.[8]

We submit that the selection of the method by which the control of spending should be exercised—through restrictions upon allotment or upon obligation—lies within the sound discretion of the President and the Administrator. The issue is basically one of timing—at what stage in the administrative process are the controls upon the rate of spending to be imposed. If the Act gives the Administrator "control over the 'rate of spending,'" as the court of appeals recognized (Pet. App. A, pp. 25A–26A), there is no practical difference in result between exercising such control at the allotment or at the obligation stage (see *infra,* pp. 25–29).

The court of appeals, however, stressed the alleged distinction between control of spending at the obliga-

[8] *Campaign Clean Water* in the district court (Pet. App. F, p. 95A): "[T]his interpretation * * * appears to de-emphasize the syntactical history of Section 205 which shows the purposeful removal of the word 'all' from §205." *Brown* v. *Ruckelshaus*, 364 F. Supp. 258, 269 (C.D. Calif.): "With all due respect to the judges who wrote those opinions, we believe that they are not correct. Neither the amendments nor the sponsors' statements received proper attention in any of the decisions. No one has convinced us that when a legislature removes the word 'all' from the phrase, 'All sums authorized to be appropriated shall be allotted,' they mean that every penny must be spent. Nor has anybody argued successfully that adding the phrase 'not to exceed' before a sum means anything more than that an upper limit must be imposed."

tion stage and control at the allotment stage. The court concluded (1) that the controls at the two stages are very different and that (2) control at the allotment stage interferes with the legislative objective of committing $18 billion to the program. In response to the Administrator's argument that "in terms of the impact on potential recipients, control over allotments and control over obligations would have the same effect" (Brief for appellant Administrator, p. 21, Reply Brief, p. 5), the court said (Pet. App. A, p. 31A):

> We disagree emphatically. Discretion over allotments necessarily confers discretion over the amount available to be spent and thus grants the executive the power to contravene the oft-stated legislative purpose to make federal money available. Could the Administrator allot $0? Happily, this is not the case, but the Administrator suggests no limit on his alleged discretion not to allot. Such authority would be greater than the power to control the rate of expenditures to which the sponsors repeatedly referred. Further, discretionary allotment would not be consonant with the overall concern, clearly expressed, of providing a total of $18 billion to combat water pollution. We find that discretion in obligation is distinctly different than discretion in allotment, and that it was only the former which this legislation was intended to confer.

A plausible but erroneous assumption underlies this reasoning: that control over the rate of spending and control over the amount of spending are very different things. This is not so. Control over the rate of

spending is necessarily control over the amount to be spent during a particular time period. A rate is defined as an amount of something during a given period of time. A rate can be reduced either by reducing the amount or extending the time period.

The court of appeals believed that control of the rate of spending at the allotment stage should not be permitted because such control could thwart the congressional intent to require that a total of $18 billion be expended on this program, *i.e.*, the amount authorized to be appropriated in Section 207 (Pet. App. A, pp. 19A–25A). Implicit in this conclusion is the apparent assumption that sums not allotted initially are thereafter lost to the program, *i.e.*, that the authorizations for the particular years provided in Section 207 lapse unless the funds therefor are allotted before the year expires. The assumption is unsound; the President and the Administrator have authority to continue to make allotments for as long as necessary, until the total amount authorized has been allotted.[9]

Although Congress provided in Section 205(a) that "[s]ums authorized" in Section 207 "shall be allotted

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[9] Even if allotments not made did lapse, the only difference would be that Congress would have another occasion to examine the issues related to amounts and rate of spending under this program. Lapse is a doctrine which preserves continuing congressional authority over executive spending. Only if one assumes that the plaintiffs have some sort of entitlement to the 1972 authorizations of Section 207 apart from and in addition to any subsequent authorization by Congress, does the fear of lapse make any difference. Such an assumption is in error. This is not a case like *Work* v. *Louisiana*, 269 U.S. 250, where Congress had granted specific, unique property to the plaintiffs.

by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized," this provision, as we have explained, *supra*, pp. 14–15, does not require him initially to allot all sums so authorized. With respect to the sums allotted, Congress provided in Section 205(b)(1) that they "shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized," and that "[a]ny amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator." Congress thus provided that even with respect to sums initially allotted, they are to continue to be available indefinitely, subject only to reallotment.[10]

There is nothing in the statute which indicates any congressional intention to preclude the Administrator from subsequently allotting sums not initially allotted during the year for which the sums were authorized. To the contrary, it would further the congressional intent that the full $18 billion authorized be expended on the program, to permit the Administrator, if he initially allots less than the full amount authorized, to allot the balance at some future time when he considers it appropriate to channel further amounts into the pro-

[10] H. Rep. No. 92-911, 92d Cong., 2d Sess., p. 93, states: "[w]ith a periodic reallotment of unused allotments, the Committee expects each of the authorizations provided in section 207 to be ultimately used and has accordingly provided *indefinite appropriation authority* to permit the payment of the obligations *regardless of the year in which this may occur*." (Emphasis added.)

gram.[11] It was presumably for these reasons that the Fourth Circuit in *Campaign Clean Water* was "strongly pursuaded" that the Administrator has that authority (Pet. App. B, p. 51A).

Once it is recognized that the Administrator has authority to allot funds beyond the authorized years, then there is no practical difference in result whether the controls upon spending are exercised at the allotment or at the commitment stage. If the Administrator were required to allot all the sums authorized, he would then control spending by restricting the rate of obligation. Such controls upon obligations would be modeled on the spending controls used under the Highway Act, which were referred to in the legislative history (*supra*, pp. 17–18). After all the sums were allotted, the portion of them equivalent to the amounts that were originally allotted would be made available for obligation. The balance of the allotted funds would

[11] The concept of continued authority to commit government funds is not novel. Cf. 31 U.S.C. 706, which provides for the withdrawal of "[t]he unobligated balances of appropriations * * * not limited to a definite period of time" only "whenever the head of the agency concerned shall determine that the purposes for which the appropriation was made has been fulfilled: or * * * whenever disbursements have not been made against the appropriation for two full consecutive fiscal years." Appropriations are defined to include contract authority. 31 U.S.C. 2. The determination that the purpose has been fulfilled is unlikely to be made here, since the 1975 needs survey made pursuant to Sections 205(b) and 516 showed total needs of $60 billion. See Costs of Construction of Publicly Owned Waste Treatment Works, H. Pub. Works Comm. Print 93-28, 93d Cong., 1st Sess., p. 2; Environmental Protection Agency, Costs of Construction of Publicly Owned Waste Water Treatment Works: 1973 Needs Survey, Table II, p. 12.

be placed in "reserve" accounts, which the Administrator could not commit until the accounts were released.

An illustration may clarify the point. For fiscal year 1973 New York was allotted $221,156,000 under the Water Pollution Control Amendments. If the full $5 billion authorized had been allotted instead of the $2 billion actually allotted, New York would have been allotted $552,890,000 under the 1973 allotment formula, an increase of $331,734,000. If full allotments had been made and obligation controls imposed, New York's total allotment of $552,890,000 would have been divided into two accounts. The amount of $221,156,000 would have been placed in one account, which the Administrator could have immediately obligated for qualified projects. The balance of $331,734,000 would have been placed in a reserve account, which the Administrator could not obligate until the funds were released.[12]

The court of appeals also relied on the provision of Section 206(f)(1) permitting the Administrator to

[12] This arrangement would not contravene the provision of Section 205(b)(1) that "Any sums allotted * * * shall be available for obligation * * * on and after the date of such allotment," because the sums in the reserve account would continue available until released. The Administrator's duty to act on applications "as soon as practicable" under Section 203(a) would not be violated because the obligation of funds by the Administrator from reserve accounts is not "practicable" if he has not been authorized to release them. Sums held in a reserve account more than one year after the close of the fiscal year would be reallotted under Section 205(b)(1), along with similar funds allotted to all other states, pursuant to the allotment formula dictated by the most recent needs survey. Likewise sums allotted after the time for reallotment should be allotted according to the reallotment formula.

obligate from future "expected" allotments. That section permits such obligation where allotments already made have been fully obligated, if a congressional authorization is in effect, and if the obligation will not exceed the expected allotment from that authorization. The court concluded that this section "would have scant operative effect if the 'state's expected allotment' could not be known because the Administrator had discretion to allot only a portion of such authorization" (Pet. App. A, pp. 33A–34A). This overlooks, however, an important fact. The "expected" allotment is the same as the state's likely percentage share of the total authorization because the expectation is not limited in time and the Administrator expects ultimately to release the full $18 billion.

Section 206(f) is part of the overall scheme of the statute which gives the Administrator power to control the rate of obligation under the program. Sections 205 and 207 give him power to slow the rate of obligation by deferring allocations. Section 206(f) gives him power to accelerate the rate of obligation beyond that dictated by the initial allotment dates of Section 205(a). Section 206(f) is consistent with the statutory plan conferring discretion on the Administrator to allot, and, the court of appeals suggested (Pet. App. A, p. 34A), with a mandatory duty to do so.

In sum, the Executive Branch did not abuse its discretion in making the judgment that the allotment stage is the proper occasion to exercise control over spending. There is nothing in the Act or its legislative history reflecting any clear congressional intent to bar the Executive Branch from exercising control at this

stage. In the absence of such congressionally shown intent, the courts should respect the expert judgment of the officials to whom Congress committed the administration of the program.

II

IN *CAMPAIGN CLEAN WATER* THE COURT OF APPEALS SHOULD HAVE DIRECTED DISMISSAL OF THE SUIT

In its complaint, Campaign Clean Water alleged that the Administrator had acted unlawfully because (1) he "lacks the discretion to refuse to allot among the states the full sums authorized by Congress" and (2) he abused his discretion "by withholding a greater amount of funds than contemplated by the Congress under the Act" (App. 36–37). During the litigation, however, the plaintiff abandoned the first claim, and when the case reached the court of appeals it involved only the second theory of illegality. As the court of appeals stated (Pet. App. B, pp. 39A–40A):

> The plaintiff concedes the Congress intended to give the executive certain discretion in making allotments under Section 205; the defendant Administrator asserts the existence of such discretion; and the District Court found that there was such discretion. The existence of discretion, therefore, is not in issue on this appeal. [Footnote omitted.]

Thus, the only portion of the complaint now relevant is the allegation that the Administrator abused his discretion by alloting less than Congress intended.

Once the court of appeals recognized that there is no issue in this case whether the Administrator has

discretion to allot less than the sums authorized, it should have directed the district court to dismiss the complaint. The district court had no jurisdiction to determine, as the court of appeals directed it to do on remand, whether the Administrator abused his discretion in alloting only 45 percent of the funds authorized. This is so for two reasons: (a) Sovereign immunity bars litigation of that claim, and (b) the only statutory basis the district court had for entertaining the claim—the Administrative Procedure Act—is unavailable because the claim involves a matter committed to agency discretion, so that the Act cannot apply.

A. SOVEREIGNTY IMMUNITY BARS THIS SUIT

1. *The suit is against the sovereign because it seeks to compel a government official to take affirmative action looking toward the spending of government funds.* The complaint in this case sought to compel action by the Administrator that would have the ultimate effect of requiring the expenditure of funds by the United States. The relief sought, in addition to a declaratory judgment, was an order directing the Administrator to increase the allotments he had previously made, and granting any other appropriate relief, including retaining jurisdiction to insure that the defendant does not by other unauthorized means "defer the obligation by states, municipalities, and other authorized agencies of allotted sums" (App. 37). The allotments, as explained above (pp. 5–6), constitute

the first step in the administrative process by which federal funds are provided to the states.

Since the allotments provide a ceiling upon the amounts which the states can receive, the increase in the allotments sought necessarily was intended to and ultimately would increase the funds the United States will furnish to the states. Indeed, the complaint recognized this by its request for possible other relief to prevent the Administrator from deferring the obligation of authorized funds. Obligation of funds is the mechanism by which the government actually commits funds to particular projects. Once the funds have been obligated, the state is entitled to receive them.

Such an attempt to compel a government official to take affirmative action that will result in the disposition of government property is an unconsented suit against the sovereign that is barred by sovereign immunity. See, *e.g.*, *Hawaii* v. *Gordon*, 373 U.S. 57; *Dugan* v. *Rank*, 372 U.S. 609; *Malone* v. *Bowdoin*, 369 U.S. 643; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682.

Hawaii v. *Gordon*, *supra*, involved a similar situation. That was an original action by the State of Hawaii against the Director of the Bureau of the Budget challenging his interpretation of the Hawaii Statehood Act. The Act provided for the transfer by the United States to Hawaii of lands there that the United States no longer needed. The Director held that this provision applied only to lands originally ceded by Hawaii to the United States or lands ob-

tained for exchange of such lands, and not to lands obtained by the United States by purchase, gift or condemnation, and so advised other federal agencies. Hawaii's suit sought an order requiring the Director "to withdraw this advice to the federal agencies, determine whether a certain 203 acres of land in Hawaii acquired by the United States through condemnation was land or properties 'needed by the United States' and, if not needed, to convey this land to Hawaii" (p. 373 U.S. at 58).

This Court held that the suit was barred by sovereign immunity. It stated (*ibid.*):

> Here the order requested would require the Director's official affirmative action, affect the public administration of government agencies and cause as well the disposition of property admittedly belonging to the United States.

The Campaign Clean Water challenge to the Administrator's discretion is subject to the same infirmities. It seeks to "require the [Administrator's] official affirmative action" of increasing the allotments; it would "affect the public administration of government agencies" by forcing the Administrator to change the basis upon which he is operating the program pursuant to the direction of the President; and it would cause "the disposition of property admittedly belonging to the United States," namely, a portion of the authorized funds that the Administrator had not yet allotted. Like the complaint that this Court dismissed in *Hawaii* v. *Gordon* because it was an unconsented "suit against the United States" *ibid.*), this ac-

tion also is barred by sovereign immunity.

2. *The case is not within the exception to sovereign immunity for situations where the government official acts beyond his statutory authority or unconstitutionally.* An exception to sovereign immunity is recognized "if the officer's action is 'not within the officer's statutory powers or, if within those powers * * * if the powers, or their exercise in the particular case, are constitutionally void.' " *Malone* v. *Bowdoin, supra,* 369 U.S. at 647, quoting from *Larson* v. *Domestic & Foreign Commerce Corp., supra,* 337 U.S. at 702. Neither exception applies here.

a. Although the complaint alleged that the Administrator's action in allotting only 45 percent of the sums authorized was "unlawful" and "outside the scope of his discretion and authority" (App. 36), this claim does not establish that his action was not "within the officer's statutory powers." *Larson, supra,* 337 U.S. at 691–692, 702, discussed below. For, once it is acknowledged that the Administrator has discretion to allot less than the full amounts authorized, his discretionary act of determining the total amount to be initially allotted cannot be beyond his "statutory powers." Even assuming *arguendo* that it may involve error in exercising those powers, it is still within them and not beyond them. It is necessarily an exercise of those powers.

Larson and *Hawaii, supra,* both support this conclusion. *Larson* was a suit against the Administrator of the War Assets Administration to prevent him from disposing of coal that the Administration allegedly had sold to the plaintiff. The plaintiff's right to the coal depended upon the interpretation of the sales contract between itself and the Administration. As in the present case, the complaint alleged that the Administrator "was acting 'illegally,' and that the refusal to deliver was 'unauthorized' " (337 U.S. at 691). The Court held that this allegation was insufficient to show that the Administrator was acting beyond his "statutory powers," since—

> There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation he, like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with. His action in so doing in this case was, therefore, within his authority even if, for purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to the respondent under the contract. [337 U.S. at 703; see also, *id.* at 691–692.]

Similarly, in the present case the Administrator's statutory authority to allot less than the total amounts authorized includes the right to determine the amount to be initially allotted.

In *Hawaii* v. *Gordon,* the claim was that the Director of the Bureau of the Budget was acting on the basis of an erroneous interpretation of the Hawaii Statehood Act. Despite this claim of illegal action, the Court held that sovereign immunity barred the suit. Indeed, the present case is an even stronger one for

application of the doctrine. There the claim was that the government officer had misinterpreted an Act of Congress; here it is only that he abused his discretion in administering the Act.

b. The complaint does not allege that the Administrator acted unconstitutionally in alloting only 45 percent of the sums authorized, and it is difficult to see how any substantial constitutional challenge could be made to that action. The state's claim to the allotment of funds under the Federal Water Pollution Control Act Amendments rests wholly upon those Amendments, not upon any constitutional provision. There is not and could not be any valid claim that the Administrator's allotment action violated any rights of the State or its residents under the Fifth Amendment.

The court of appeals stated (Pet. App. B, pp. 46A–47A) that when the executive withholds from spending "so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review." But the court's characterization of the validity of the Administrator's refusal initially to allot more than 45 percent of the amounts authorized as presenting "an issue of constitutional dimensions" does not bring this case within the "unconstitutional action" exception to sovereign immunity. The theory of that exception is that when a government official acts unconstitutionally, it is not the action of the sovereign at all but the personal act of the official, since the latter cannot be acting for the sovereign when he exceeds the sovereign's

constitutional power. The validity of the amount of the initial allotments the Administrator made in the exercise of his statutory discretion does not even remotely approach an unconstitutional exercise of government authority.

c. Most cases in which the government official allegedly has acted beyond his statutory authority or unconstitutionally were situations where the plaintiff claimed that the property being held by the sovereign was his property. Cf. *Larson* and *Malone, supra.* In this case, however, as in *Hawaii* v. *Gordon,* the property which the plaintiff seeks to obtain is admittedly property of the sovereign, and the claim is that he is entitled to receive the property from the sovereign under a statutory right to entitlement. This Court recognized in *Larson, supra,* that such a claim is one against the sovereign and not subject to the exceptions for unauthorized or unconstitutional action:

> Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will *require* affirmative action by the sovereign or *the disposition of* unquestionably sovereign property. [337 U.S. at 691, n. 11.]

Only where the official's duty to dispose of the sovereign's property is ministerial have the courts permitted suit to be maintained to compel its disposition. *Work* v. *Louisiana,* 269 U.S. 250; *Kendall* v. *United States ex rel. Stokes,* 12 Pet. 524. The present case, in which the plaintiff is seeking to compel a

government official to furnish him with greater government funds than the official believes is appropriate, is a suit against the sovereign.

3. *The Administrative Procedure Act does not waive the United States' sovereign immunity.* The circuits are divided over whether the sovereign immunity of the United States has been waived by the Administrative Procedure Act. Five courts of appeals have held that it has not been waived. *Littell* v. *Morton,* 445 F. 2d 1207, 1212 (C.A. 4); *State of Washington* v. *Udall,* 417 F. 2d 1310, 1320 (C.A. 9); *Motah* v. *United States,* 402 F. 2d 1, 2 (C.A. 10); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe,* 370 F. 2d 529, 532 (C.A. 8); *Cyrus* v. *United States,* 226 F. 2d 416 (C.A. 1).[13] Three circuits have taken the contrary view. *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F. 2d 859, 873–874 (C.A.D.C.); *Estrada* v. *Ahrens,* 296 F. 2d 690 (C.A. 5); Compare *Warner* v. *Cox,* 487 F. 2d 1301

[13] In *Littell* and *State of Washington*, however, the courts held sovereign immunity inapplicable because they concluded that the interests served by judicial review in the particular case outweighed the interests served by sovereign immunity, even though both actions sought to effect a disposition of sovereign property. See 445 F. 2d at 1213–1214, 417 F. 2d at 1320. *Littell* involved a claim for legal fees for services rendered. *State of Washington* involved a claim that certain water should be made available to the State without legal restrictions thought controlling by the agency. If the suit is against the sovereign, however, only Congress can waive immunity, and the courts cannot decide whether to entertain such suits based upon their evaluation of the relative interests to be served by judicial review in the particular case. In any event, the present action, involving an administrative process central to the operation of the entire executive branch (see *infra*, pp. 44–46), involves wholly different considerations.

(C.A. 5) and *Colson* v. *Hickel,* 428 F. 2d 1046 (C.A. 5); *Kletschka* v. *Driver,* 411 F. 2d 436, 445 (C.A. 2) (alternative ground for decision).

The cases holding that the Administrative Procedure Act waived sovereign immunity rely upon Section 10(a) of that Act (60 Stat. 243), now 5 U.S.C. 702, which provides: "A person * * * adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." This section does not deal with jurisdiction, however, but only with standing. The provision dealing with jurisdiction, Section 10(b), now 5 U.S.C. 703, states that the "form of proceeding for judicial review is * * * any applicable form of legal action * * * *in a court of competent jurisdiction*" (emphasis supplied).

The Administrative Procedure Act does not of itself confer jurisdiction, but only prescribes the procedures for administrative review in courts having jurisdiction. Since sovereign immunity is a jurisdictional issue, the Administrative Procedure Act did not waive it. As this Court said of that Act in *Blackmar* v. *Guerre,* 342 U.S. 512, 515–516, "Still less is the Act to be deemed an implied waiver of all governmental immunity from suit."

B. THE ONLY BASIS UPON WHICH THE DISTRICT COURT MIGHT HAVE AUTHORITY TO HEAR THIS SUIT—THE ADMINISTRATIVE PROCEDURE ACT—IS INAPPLICABLE BECAUSE THE CHALLENGED ACTION INVOLVES A MATTER COMMITTED TO AGENCY DISCRETION

A district court may review an administrative order only if (1) the governing statute itself provides for review and the plaintiff has followed the statutory procedures, or (2) the Administrative Procedure Act

permits review. Neither basis is present here, and the court of appeals accordingly should have directed the district court to dismiss the complaint."

1. The Federal Water Pollution Control Act Amendments authorize any citizen to file a civil action "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator" and give the district courts "jurisdiction * * * to order the Administrator to perform such act or duty * * *" (Section 505(a)). This authority, however, is specifically subject to the requirement in subparagraph (b) that "No [such] action may be commenced * * * prior to sixty days after the plaintiff has given notice of such action to the Administrator."

The complaint in this case does not allege that subparagraph (b) was complied with, and the Admin-

" Campaign Clean Water also invoked the jurisdiction of the district court under the federal mandamus statute, 28 U.S.C. 1361. Since petitioner recognizes that the Administrator has discretion to allot less than the amount authorized, however, mandamus would not lie. That writ may issue only to compel performance of a ministerial act, but not to control the exercise of discretion. *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218; *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 420; *United States ex rel. Girard Trust Company* v. *Helvering*, 301 U.S. 540, 543; *Panama Canal Company* v. *Grace Line, Inc.*, 356 U.S. 309, 318. Section 1361 recognizes that limitation upon the use of mandamus, since it gives the district courts jurisdiction "of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to *perform a duty* owed to the plaintiff" (emphasis added).

istrator has advised us that he was not given such notice. Indeed, the complaint on its face shows that the 60-day statutory notice could not have been given before it was filed. The action of the Administrator in allotting less than the total amounts authorized was announced on November 28, 1972 and the complaint was filed on January 15, 1973, only 48 days later (App. 33, 36, 37). Moreover, the plaintiff did not invoke the jurisdiction of the district court under this provision, but only under 28 U.S.C. 1331 and 1361 (App. 35).

Since Congress required, as a condition of invoking the jurisdiction of the district court under Section 505, that 60 days' notice be given to the Administrator prior to the filing of the suit, the failure to give such notice resulted in the district court having no jurisdiction under that Section. Since that section constituted a waiver of sovereign immunity, the terms upon which Congress consented to suit must be observed. *Soriano* v. *United States*, 352 U.S. 270, 276; *United States* v. *Sherwood*, 312 U.S. 584, 590–591. The fact that had the plaintiff given such notice, it was unlikely that the Administrator would have changed his action, is immaterial. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

Finally, for the reasons we now discuss, the action of the Administrator here challenged was discretionary, and hence not covered by Section 505(a).

2. The judicial review provisions of the Administrative Procedure Act (5 U.S.C. 701–706) are applicable "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to

agency discretion by law" (5 U.S.C. 701(a)). These two exceptions must be read together. The exception for matters "committed to agency discretion by law" covers more than the situation where the statute provides that the administrative action is not subject to judicial review, such as 38 U.S.C. 211(a), "which prohibits judicial review of decisions of the Administrator [of Veterans Affairs]" (*Johnson* v. *Robison*, No. 72–1297, decided March 4, 1974 (slip op. p. 3)). Rather, it reflects the congressional judgment that administrative determinations that turn upon the exercise of discretion are not to be judicially reviewed under the Administrative Procedure Act. *Panama Canal Co.* v. *Grace Line, Inc., supra*, 356 U.S. at 317–319.

In the *Panama Canal* case, the court held that a suit to compel the Canal Company to prescribe new tolls for the use of the Canal and to refund tolls allegedly illegally collected raised issues that were "by law committed to agency discretion" within the meaning of Administrative Procedure Act (356 U.S. at 317). Noting that determining the proper level of tolls for the Canal "involve[s] nice issues of judgment and choice * * * which require the exercise of informed discretion" and requires the Canal Company to make "questions of judgment requiring close analysis and nice choices" (356 U.S. at 317, 318), the Court concluded: "the initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co." (*id.* at 317).

Similarly, the action of the President, acting through the Administrator, in setting the levels of

allotment is committed to agency discretion by law. The words in the Administrative Procedure Act "by law" are not limited to a statute that specifically commits the matter to the agency, since that interpretation would render superfluous the other exception for situations where "statutes preclude judicial review." Rather, the determination whether a matter is committed to agency discretion depends upon the entire statutory scheme. Here, as we have shown above, the Water Pollution Control Act Amendments leave the making of the allocation to the discretion of the Executive Branch.

Indeed, unlike some statutes which provide guidelines for officials to consider in exercising their discretion (see, *e.g.*, *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604), here the governing statute does not announce any specific precepts that are to guide the President in determining allottments. On the contrary, the legislative history discussed above shows that Congress recognized that under the Act the President would have discretionary authority to control the rate of spending by initially committing less to the program than the total amounts authorized in Section 207.

The determination of the amount of funds to be allotted at a particular time is the essence of discretionary action, and is not subject to judicial revision upon the claim that the allottment actually made constituted an abuse of discretion. Indeed, it is difficult to formulate an appropriate basis upon which a court properly could review the validity of the President's

discretionary determination in setting the particular level selected.

The court of appeals suggested that on the remand the district court should consider whether there has been "a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals" (Pet. App. B, p. 46A), whether "the Administrator, in exercising his discretion under Section 205, acted so arbitrarily as to frustrate the attainment of the legislative goals" (*id.* 50A), and "whether the factors used by the defendant [Administrator] in fixing the allotments were the ones that were 'relevant' under a proper construction of the discretionary power found to exist in the executive" (*id.* 53A). In his letter directing the Administrator to allot not more than $2 billion for fiscal year 1973 and not more than $3 billion for the following fiscal year, however, the President stated that his decision, while "provid[ing] for improving water quality," "recognizes the highest national priority, the need to protect the working men and women of America against tax increases and renewed inflation" (App. 16).

In other words, the President ordered these particular limits upon the amounts to be allocated primarily to avoid a tax increase and inflation. It was because Congress recognized that the President should have discretion to control the rate of spending in order to further these interests that it authorized him, acting through the Administrator, to commit less to this program initially than the total amounts authorized.

In these circumstances, it was inappropriate for the court of appeals to direct the district court to conduct the freewheeling inquiry that would necessarily be involved in deciding such questions as whether the amount withheld through allotment would "frustrate" or "make impossible" the "attainment of the legislative goals." Such an inquiry raises extremely complex and difficult issues relating to the proper effectuation of legislative policies by the Executive Branch that the courts are ill suited to resolve. They involve determinations that Congress has committed to the executive branch of government, not to the judicial branch.[15]

The court of appeals may have been questioning whether the President properly could reduce allottments in order to further broad national fiscal policies not directly related to the Water Pollution Control Program itself. In *State Highway Commission of Missouri* v. *Volpe*, 479 F. 2d 1099 (C.A. 8), the court adopted that limited view of the scope of the Secretary of Transportation's discretionary authority to obligate

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[15] As the Administrator testified:

> If fiscal responsibility is to be achieved, as the President has resolved it will be, hard decisions to fund Federal programs at less than their maximums may be necessary. The inevitable criticism and controversy should not deter those decisions.
>
> "As I mentioned earlier, the responsibility to make the decision on funding was placed on the President's shoulders by the legislation itself. It is a difficult and complex responsibility and it has been carried out in the full context of a comprehensive and long-range policy directed toward the health and prosperity of the Nation.

Joint Hearings, *supra*, p. 405.

less than the total amounts authorized under the Federal-Aid Highway Act of 1956. There the court relied upon what it deemed to be indications that Congress did not intend to sanction withholding of funds under that statute as an anti-inflation measure (479 F. 2d at 1115–1116) and it interpreted the statute itself as providing that apportioned funds are not to be withheld from obligation for purposes totally unrelated to the highway program" (*id.* 1116, footnote omitted).[16]

The statute involved in this case, however, contains no such indication. To the contrary, as we have shown, the legislative history indicates that Congress recognized that the Executive could control the rate of spending because of general fiscal considerations unrelated to the program.[17]

In holding that the discretionary action of the Administrator in this case was not excepted from judicial examination by the Administrative Procedure Act's exemption for "matters committed to agency discretion," the court of appeals relied (Pet. App. B, p. 45A) upon this Court's statement in *Citizens to Pre-*

[16] We submit that the court in *State Highway* misconstrued the statute there at issue.

[17] The question whether Congress's use of mandatory language can subsequently prevent the President from spending less than the total amount appropriated for a particular program, when the reduction is necessary to protect the financial integrity of the government, presents difficult and complex constitutional issues involving the allocation of powers. Since the legislative history shows that Congress recognized in the Water Pollution Control Act Amendments that the President would and should have discretion to control the rate of spending because of general fiscal considerations, there is no occasion for the Court here to reach the broad constitutional issues, and accordingly we do not discuss them.

serve Overton Park v. *Volpe,* 401 U.S. 402, 410 that "[t]his is a very narrow exception * * * that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" The present case is one of those "rare instances" since here, unlike the situation in *Overton Park,* Congress has not prescribed the standards the President is to apply in deciding how much of the amounts authorized are to be initially allocated. Although the Water Pollution Control Act Amendments specify in detail the criteria for determining whether a particular project should be authorized, they do not provide standards by which the discretionary allotment authority is to be exercised.

The inquiry which the court of appeals directed the district court to make would thrust the courts into the area of political judgments by requiring managerial decisions. Criteria fitted for judicial decision-making are absent. The district court would thus be asked to make a decision that courts have always eschewed as political questions. Such issues are not justiciable in the federal courts. *Colegrove* v. *Green,* 328 U.S. 549; *Baker* v. *Carr,* 369 U.S. 186, 208–237. "In determining whether a question falls within that [political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations" (*Coleman* v. *Miller,* 307 U.S. 433, 454–455, footnote omitted). Both of these considerations show that the propriety of the amounts

the Administrator has initially allotted, pursuant to the direction of the President, presents an unstructured managerial issue or political question that is not for judicial resolution.

CONCLUSION

The judgments of the court of appeals in both cases should be reversed and the cases remanded to the district court with instructions to dismiss the complaints.

Respectfully submitted.

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APPENDIX

TABLE I

Status of wastewater treatment works construction grant funds under Public Law 92-500 as of May 31, 1974 [1]

State/territory	Fiscal year 1973			Fiscal year 1974			Fiscal year 1975		
	Allotments	Obligations	Percent obligated	Allotments	Obligations	Percent obligated	Allotments	Obligations	Percent obligated
Alabama	7, 224, 000	2, 609, 216	36	10, 836, 000			33, 785, 150		
Alaska	4, 504, 000	4, 442, 597	98	6, 756, 000	6, 184, 292	91	15, 059, 100		
American Samoa	96, 000			144, 000			576, 700		
Arizona	2, 692, 000	2, 011, 635	74	4, 038, 000			17, 695, 750		
Arkansas	7, 072, 000	6, 489, 030	91	10, 608, 000	8, 461, 741	79	23, 860, 100		
California	196, 352, 000	115, 881, 479	59	294, 528, 000			457, 420, 100		
Colorado	6, 332, 000	6, 332, 000	100	9, 498, 000	250		30, 930, 900		
Connecticut	33, 620, 000	33, 620, 000	100	50, 430, 000	13, 072, 501	25	69, 542, 900		
Delaware	13, 130, 000	3, 295, 500	25	19, 695, 000			21, 815, 300		
District of Columbia	14, 228, 000	14, 228, 000	100	21, 342, 000	21, 135, 400	99	38, 233, 800		
Florida	72, 528, 000	59, 551, 000	82	108, 792, 000	26, 940, 254	24	164, 496, 400		
Georgia	19, 460, 000	18, 976, 791	97	29, 190, 000			76, 153, 000		
Guam	1, 744, 000			2, 616, 000			2, 172, 000		
Hawaii	6, 606, 000			9, 909, 000			41, 140, 000		
Idaho	4, 354, 000	4, 341, 669	99	6, 531, 000	3, 920, 087	60	7, 898, 400		
Illinois	124, 978, 000	82, 238, 235	65	187, 467, 000			252, 311, 700		
Indiana	67, 324, 000	26, 889, 830	39	100, 986, 000			63, 678, 100		
Iowa	23, 114, 000	23, 114, 000	100	34, 671, 000	25, 078, 943	72	39, 364, 800	1, 400, 000	4
Kansas	7, 484, 000	5, 842, 030	78	11, 226, 000			40, 192, 500	600, 000	1
Kentucky	13, 198, 000	10, 283, 940	77	19, 797, 000			65, 183, 600		
Louisiana	18, 856, 000	14, 980, 565	79	28, 284, 000	327, 480	1	35, 551, 850		
Maine	19, 350, 000	19, 350, 000	100	29, 025, 000	20, 747, 309	71	26, 227, 000		
Maryland	85, 164, 000	85, 164, 000	100	127, 746, 000	17, 704, 455	13	54, 128, 100		
Massachusetts	75, 152, 000	61, 526, 000	81	112, 728, 000	68, 334, 726	60	90, 215, 900		
Michigan	159, 628, 000	158, 921, 500	99	239, 442, 000	15, 552, 925	6	188, 637, 400		
Minnesota	40, 638, 000	38, 345, 368	94	60, 957, 000	6, 230, 000	10	64, 247, 300		
Mississippi	7, 870, 000	1, 342, 160	17	11, 805, 000			22, 346, 700		
Missouri	33, 112, 000	30, 401, 300	91	49, 668, 000			74, 546, 400	7, 940, 620	11
Montana	3, 324, 000	3, 324, 000	100	4, 986, 000	4, 765, 650	95	7, 534, 600		
Nebraska	7, 416, 000	7, 320, 220	98	11, 124, 000	726, 550	6	20, 894, 000		
Nevada	5, 754, 000	5, 672, 615	98	8, 631, 000	1, 026, 530	11	18, 695, 600		
New Hampshire	16, 618, 000	16, 618, 000	100	24, 927, 000	8, 973, 635	35	35, 072, 950		
New Jersey	154, 080, 000	154, 080, 000	100	231, 120, 000	65, 361, 420	28	254, 656, 200	5, 937, 900	2
New Mexico	4, 216, 000	1, 401, 938	33	6, 324, 000	964, 791	15	10, 670, 500		
New York	221, 156, 000	214, 556, 175	97	331, 734, 000	1, 410, 230		490, 654, 200		
North Carolina	18, 458, 000	8, 722, 616	47	27, 687, 000			70, 494, 200		
North Dakota	934, 000	908, 516	97	1, 401, 000	472, 925	33	6, 876, 100	65, 400	1
Ohio	115, 474, 000	115, 186, 000	99	173, 211, 000	4, 344, 230	2	193, 378, 700		
Oklahoma	9, 216, 000	8, 049, 375	87	13, 824, 000	4, 302, 135	31	46, 997, 400		
Oregon	16, 988, 000	16, 973, 735	99	25, 482, 000	22, 948, 223	90	34, 136, 700	562, 585	
Pacific Islands Terr	756, 000	297, 675	39	1, 134, 000			524, 300		
Pennsylvania	108, 428, 000	94, 559, 530	87	162, 642, 000	220, 880		222, 744, 100		
Puerto Rico	17, 690, 000	3, 984, 633	22	26, 535, 000			40, 832, 900		
Rhode Island	9, 778, 000	9, 778, 000	100	14, 667, 000	914, 825	6	20, 864, 000		
South Carolina	12, 910, 000	8, 114, 321	62	19, 365, 000			55, 922, 000		
South Dakota	1, 896, 000	1, 896, 000	100	2, 844, 000	545, 775	19	7, 308, 800		
Tennessee	23, 210, 000	17, 519, 604	75	34, 815, 000			48, 371, 800		
Texas	55, 388, 000	55, 347, 224	99	83, 082, 000	4, 734, 761	5	106, 900, 250		
Utah	2, 816, 000	1, 492, 425	52	4, 224, 000			16, 579, 600		
Vermont	4, 436, 000	4, 330, 212	97	6, 654, 000	465, 480	6	11, 800, 800		
Virginia	58, 286, 000	58, 286, 000	100	87, 429, 000	37, 324, 730	42	98, 672, 400		
Virgin Islands	1, 786, 000			2, 679, 000			3, 130, 900		
Washington	17, 812, 000	17, 799, 781	99	26, 718, 000	18, 244, 757	49	64, 730, 500		
West Virginia	9, 998, 000	6, 089, 460	60	14, 997, 000			37, 735, 700		
Wisconsin	34, 830, 000	6, 790, 650	19	52, 245, 000	57, 375		52, 360, 400		
Wyoming	536, 000	536, 000	100	804, 000	93, 775	11	4, 049, 450		

[1] Preliminary figures for fiscal year 1975. Extracted from U.S. Environmental Protection Agency report—Activities of Grants Assistance Programs, May 1974, pp. 14–15.

(41343)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1377

RUSSELL E. TRAIN, as Administrator of the United States Environmental Protection Agency,

Petitioner,

—v.—

THE CITY OF NEW YORK, on behalf of itself and all other similarly situated municipalities within the State of New York, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT THE CITY OF NEW YORK

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—v.—

THE CITY OF NEW YORK, on behalf of itself and all other similarly situated municipalities within the State of New York, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT THE CITY OF NEW YORK

Question Presented

Did the Petitioner-Administrator violate section 205(a) of the Federal Water Pollution Control Act when, at the direction of the President, he allotted among the states only five of the eleven billion dollars authorized by Congress for fiscal years 1973 and 1974, for federal assistance in the construction of sewage treatment works?*

* The question of sovereign immunity, although raised in the Administrator's petition for certiorari in this case (73-1377), is no

Statement

The Federal Water Pollution Control Act Amendments of 1972* completely revised the Federal Water Pollution Control Act (the "Act"). It created a comprehensive new program to clean up the nation's waterways. The Act now declares that it is the national goal to eliminate totally the discharge of pollutants into the navigable waters by 1985. Title II establishes a program to assist state and local governments to build the sewage treatment works that are needed to achieve that goal. This program provides for federal reimbursement to state and local governments of 75% of the cost of construction of such works.

The Act authorizes certain sums to be appropriated for each of the fiscal years 1973, 1974 and 1975 and establishes a funding mechanism, known as "contract authority," whereby the Administrator is empowered to enter into contracts, up to the authorized sums, to pay state and local governments the federal share of the cost of projects that he approves. There are three distinct stages in that process—allotment of the authorized sums among the states; the creation of contractual obligations by the United States to finance particular projects or phases thereof; and actual disbursement of federal money for reimbursable costs.

Allotment is prescribed in section 205, set out in full at pages 3-5 of the Government's brief. Subsection (a) directs

longer present here. The Administrator now concedes that if, as we contend, allotment is a ministerial act, then "the district courts have jurisdiction to order that it be done." Pet. Br. at p. 14.

* 86 Stat. 816. The Federal Water Pollution Control Act, as revised by the 1972 Amendments, is codified in 33 U.S.C. §§ 1251-1376.

that the authorized sums, which are the maximum amounts which the Administrator may obligate, "shall be allotted . . . not later than" six months before the beginning of the fiscal year for which they were authorized (except that the allotment for fiscal 1973 was to be within 30 days of enactment).* These maximum amounts are apportioned among the states in accordance with a congressionally-prescribed formula of the need for treatment works in the various states; such apportionment establishes state-by-state ceilings on the Administrator's contract authority. Subsection (b)(1) directs that allotted sums "shall be available for obligation" in a state from the allotment date and "shall continue available for obligation" for one year after the close of the fiscal year for which they are authorized. Any allotted amounts not obligated by then "shall be immediately reallotted" among the states and "shall be in addition to any funds otherwise allotted" to a state. There is no provision for total lapse of any of the authorized funds.

The second stage of the funding mechanism, sometimes called the obligational stage, is the stage at which allotted funds may be obligated by the United States. It is prescribed by section 203. After a state prepares a priority list of projects, the state or one of its local governments applies for a grant from the allotted funds for each project it proposes to build. It does this by preparing and submitting to the Administrator plans, specifications and cost estimates for the project. The proposal must meet the requirements enumerated in section 204, which include assurance that the applicant has taken whatever steps are required by local law to raise and commit the non-federal

* Thus the specified dates have all passed.

share of construction costs. The Administrator then reviews the application and, upon his approval, the United States becomes contractually obligated to pay the federal share of the cost of that project. The third stage, also prescribed in section 203, is reimbursement of the state or local government from time to time as construction progresses and vouchers are presented for actual costs incurred.

In deciding on contract authority funding, Congress rejected a Presidential recommendation for the more conventional authorization-appropriation funding, under which projects would be dependent for completion on uncertain annual appropriations. A related difference between Congress and the President concerned the size of the program. The President proposed a $6 billion effort. The Senate initially settled on $14 billion. The House decided on $18 billion and its view prevailed in the Conference Committee.

The Conference Committee did, however, adopt two amendments in the acknowledged hope of avoiding a veto. They are known as the Harsha Amendments after Representative William H. Harsha, the senior minority conferee from the House.* The words "not to exceed" were inserted in section 207, so that it authorized to be appropriated not to exceed $5 billion for fiscal 1973, not to exceed $6 billion for fiscal 1974 and not to exceed $7 billion for fiscal 1975. And the word "all" was deleted from the beginning of the sentence in section 205(a) which now reads "Sums authorized . . . shall be allotted . . . not later than . . . ." The

* Representative Harsha is also the ranking minority member of the House Committee on Public Works, which reported the House version of the Federal Water Pollution Control Act Amendments of 1972, and he was a floor manager of the bill.

general objective of the Amendments, as shown at pages 15-21 of the Government's brief, was to "emphasize the President's flexibility to control the rate of spending."

The President nonetheless vetoed the conference bill because $18 billion was too large a "commitment." He noted that the Act conferred upon him "a measure of spending discretion and flexibility." But, he said, "political realities" would lead to ultimate spending of the full $18 billion despite what he referred to as certain "technical controls" in the legislation. 118 Cong. Rec. S 18534 (daily ed. October 17, 1972). The veto was overridden 52-12 in the Senate and 247-23 in the House.

It was in this setting that the President on November 22, 1972 directed the Administrator to allot only $5 billion of the $11 billion that the Act authorized to be appropriated for fiscal 1973 and 1974. App., p. 15.* On December 8 the Administrator allotted the reduced amounts. 37 Fed. Reg. 26282 (December 8, 1972).**

On December 12, the City of New York brought suit in the District Court for the District of Columbia alleging that the Administrator was required to allot the full $11 billion for fiscal 1973 and 1974. The District Court granted the City's motion for summary judgment and the Court of Appeals unanimously affirmed.

The Administrator's position is that under the Act he may control the rate of spending by controlling the amounts

* References to the Appendix filed with the Administrator's brief will be designated "App." References to the appendix filed with the petition for certiorari will be designated by the letter "A".

** On January 15, 1974 the Administrator allotted $4 billion of the $7 billion authorized for fiscal year 1975.

to be allotted. The Court of Appeals below made a painstaking study of the extensive legislative history of Title II. While recognizing that the Act confers some discretion to control the rate of spending, the court concluded that such discretion was meant to be exercised only at the obligational stage. Thus, the court held, the Administrator acted illegally by reducing, at the allotment stage, the moneys available for obligation. 1A-34A.

Summary of Argument

The Harsha Amendments are the purported basis for the Administrator's action. The legislative history of those Amendments clearly shows that they were not intended to confer on the Administrator any discretion to allot less than the full sums authorized. Rather, the legislative history shows that the intent was only to emphasize that the Administrator would have some control over the rate of spending at the obligation stage of the funding mechanism. As would be expected, that intent is in harmony with the basic objective of Title II: to enable local governments to start planning forthwith the $24 billion* of needed treatment plants. Discretionary allotment would subvert that purpose.

The Government focuses only on those portions of the legislative history that show that the Administrator was to have some control over the rate of spending. It ignores the numerous indications that such control was to be exercised at the obligation stage. From this narrow perspective the Government attempts to formulate a construction of the Act which substantiates discretionary allotment.

* $18 billion of federal money and $6 billion of local money.

First, the Government asserts that the Administrator may make reduced "initial" allotments and subsequent "augmenting" allotments until the full $18 billion is "ultimately" allotted. Thus, it is contended, there is no "practical difference" between rate of spending control exercised at the allotment or obligation stage. Finally, it is argued, the court should defer to the expert judgment of the Administrator as to whether to control spending at the allotment or at the obligation stage.

There are several fatal flaws in the Government's theory. First, the concept of "initial" and "augmenting" allotments is conspicuously absent from the language of the Act or its legislative history. Moreover, even if the theoretical plausibility of the concept were accepted, it would occasion serious practical difficulties in the operation of the pollution control program. Finally, adoption of the Government's theory would impute to Congress the inherently improbable intent to empower the Executive to accomplish by administrative action substantially what the President was unable to accomplish by persuasion, warnings of a likely veto and veto itself.

POINT I

The legislative history of the Harsha Amendments shows clearly that their sole purpose was to emphasize that the Administrator would have some discretion at the obligation stage of the funding process to control the rate of spending.

The Government contends that the Harsha Amendments conferred on the Administrator "full authority" (Pet. Br. at p. 21) to control the rate of spending and that, accordingly, the Administrator has unreviewable discretion to determine at what stage to exercise such control.* The Administrator does not even purport to find in the legislative history support for the concept of discretionary allotment. Rather, he states only that Congress "did not focus upon the stage

* The Administrator also claims broad discretion with regard to the criteria applicable to the exercise of such control. For example, the Government states that "[s]uch control may be exercised in the interest of overall government fiscal policies that are not related to the particular program involved." Pet. Br. at p. 10. We have throughout this litigation adhered to the position that such discretion is more limited, *i.e.*, that it is circumscribed by the congressional purpose expressed in the Act. *See, e.g., Work* v. *United States ex rel. Rives*, 267 U.S. 172, 177-8 (1925). In our opinion *State Highway Comm'n of Missouri* v. *Volpe*, 479 F.2d 1099 (8th Cir. 1973), provides substantial guidance on this question.

In any event, the scope of the Administrator's discretion is not at issue in this case. We do direct the Court's attention, however, to the Administrator's assertion (Pet. Br., pp. 27-28) that, if the Court of Appeals is affirmed and he is directed to allot the remaining $9 billion, he will simply place those funds in a "reserve" account unavailable for obligation. Since we do not believe that the Administrator's obligational discretion is so unconstrained, such a "reservation" of funds would likely lead to further litigation. Accordingly, we respectfully request that, should the Court affirm, it foreclose any later argument that its possible silence in the face of this suggestion connotes approval of the theory propounded.

at which such control would be exercised." Pet. Br. at p. 22.

It might be difficult to discern with confidence the intent of Congress if there were available only the text of the Act and knowledge that the Harsha Amendments had been made. Even under those circumstances, however, the inconsistency of discretionary allotment with the underlying purposes of the Act and with the function of allotment in the funding mechanism, would cogently argue for imputing to Congress an intent to affect only the obligational process. Fortunately, though, there are also available clear explanations of the Amendments on the floor of both the Senate and the House. They make explicit an intent by the Amendments merely to emphasize that the Administrator could control the rate of spending at the obligation stage. They contain no indication of an intent to confer upon him any discretion at the allotment stage.

(1) *Senate Discussions.*

The history of the Senate's consideration of the Act reveals a clear understanding by that body that the Harsha Amendments did not alter the mandatory requirement of full allotment in fiscal years 1973-1975. In first explaining the Amendments, Senator Edmund S. Muskie, the senior majority conferee from the Senate,* told his colleagues:

> "The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the

* Senator Muskie is also chairman of the Senate Subcommittee on Air and Water Pollution, which reported the Senate version of the bill, and he was a floor manager.

> Federal Government in 75—percent grants to municipalities *during fiscal years 1973-75.*
>
> • • • •
>
> Under the amendments proposed by Congressman William Harsha and others, the authorizations for obligational authority are "not to exceed" $18 billion over the next 3 years. Also "all" sums authorized to be obligated need not be committed, *though they must be allocated.* These two provisions were suggested to give the Administration *some flexibility concerning the obligation* of construction grant funds."

118 Cong. Rec. S 16870-71 (daily ed. October 4, 1972). (Emphasis added.)* Senator Muskie expanded on the Administrator's flexibility by noting that "the conferees do not expect [it] . . . to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the Act." *Ibid.* He then noted that in instances where the Administrator's flexibility was to be exercised, "the conferees would, of course, expect the administration to refuse to enter into contracts for construction." *Ibid.* In sum, then, Senator Muskie's remarks made it clear that the Act envisages the allotment of $18 billion over three fiscal years and that the Administrator's flexibility over the rate of spending is to be exercised only at the obligation stage.

After the veto Senator Muskie repeated the exact words, quoted above, he had used before the veto to explain the Harsha Amendments. *Id.* at S 18546 (daily ed. October 17, 1972). He then went on to illustrate the budget impact

* The original Senate bill used the term "allocate." The Administrator agreed below that Senator Muskie's use of "allocate" instead of "allot" was of no import. 21A n. 19.

of the Act by introducing a table showing the "Rate of Expenditures" under the Act in fiscal years 1973 through 1979.* *Id.* at S 18547. He gave the following explanation of the table's data:

> "The second year we would spend $1.3 billion. The third year we would spend $3.05 billion. The fourth year we would spend $5.2 billion.
>
> That is spending. It takes time to crank up these waste treatment facilities. It takes time to build up the bricks and mortar. That is why it would take 7 years to spend *the money that would be subject to contract authority in the next 3 years.*"

Ibid. (Emphasis added.) It is evident from the table and Senator Muskie's discussion that the full $18 billion must

* RATE OF EXPENDITURES BY FISCAL YEAR[1] UNDER AUTHORIZATIONS OF S. 2770[2]

[in billions]

	Fiscal year 1973	Fiscal year 1974	Fiscal year 1975	Total
Fiscal year:				
1973	$0.25	----	----	$0.25
1974	1.00	$0.30	----	1.30
1975	1.50	1.20	$0.35	3.05
1976	2.00	1.80	1.40	5.20
1977	.25	2.40	2.10	4.75
1978	----	.30	2.80	3.10
1979	----	----	.35	.35
Total	5.00	6.00	7.00	18.00

[1] 1st year, 5 percent of authorization; 2nd year, 20 percent of authorization; 3d year, 30 percent of authorization; 4th year, 40 percent of authorization; 5th year, 5 percent of authorization.

[2] Fiscal year 1973, $5,000,000,000; fiscal year 1974, $6,000,000,000; fiscal year 1975, $7,000,000,000.

The figures in the table were based upon the Administrator's estimates of the rate at which the allotments would be obligated.

be allotted in fiscal years 1973-1975, for only then would the money be "subject to contract authority" in those years. Since the amounts available for obligation in the three fiscal years are thus fixed and determined, the "rate" of spending can be controlled only by controlling the time period over which these fixed amounts are obligated. Thus, although the Administrator is technically correct in asserting that "a rate can be reduced either by reducing the amount or extending the time period" (Pet. Br. at p. 25), the salient fact here is that the statute precludes reduction of the amount. It is for this reason that the table depicts the "rate" at which the allotted sums will be spent in terms of the time period (*i.e.*, fiscal years 1973-1979) during which such sums will come due for appropriation after obligation by the Administrator.

It should be noted, too, that at no time during the long debates was Senator Muskie's explanation of the Act's important funding provisions ever challenged. Surely, other Senators, particularly other conferees, would not have remained silent if they disagreed with those crucial statements. *See, National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U.S. 453, 460 (1974).

(2) *House Discussions.*

In the House there was no explicit mention of allotment. However, Representative Harsha and others recurringly described the activity affected by the Harsha Amendments with the words "obligation or expenditure", "obligate or expend", "obligation and expenditure", "expenditures", and "expenditures and appropriations". Thus, for example, a pre-veto colloquy among Representative Harsha, then-Representative Ford and Representative Jones, chairman of the House conferees, went as follows:

> "Mr. GERALD R. FORD, Mr. Speaker . . . I think it is vitally important that the intent and purpose of section 207 is spelled out in the legislative history here in the discussion on this conference report.
>
> As I understand the comments of the gentleman from Ohio [Harsha], the inclusion of the words in section 207 in three instances of "not to exceed" indicates that it is a limitation. More importantly that it is not a mandatory requirement that in 1 year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*
>
> Mr. HARSHA, I do not see how reasonable minds could come to any other conclusion than that the language means we can *obligate or expend* up to that sum—anything up to that sum but not to exceed that amount . . . .
>
> Mr. GERALD R. FORD. Mr. Speaker, I would like to ask the distinguished chairman of the subcommittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio (Mr. Harsha).
>
> Mr. JONES of Alabama . . . . My answer is "yes." Not only do I agree with him but the gentleman from Ohio offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio (Mr. Harsha).
>
> Mr. GERALD R. FORD. Mr. Speaker, this clarifies and certainly ought to wipe away any doubts anyone has. The language is not a mandatory requirement for full

> *obligation and expenditure* up to the authorization figure in each of the 3 fiscal years."

118 Cong. Rec. H 9123 (daily ed. October 4, 1972). (Emphasis added.)

In assuring Representative Ford that there need not be "full obligation" in fiscal years 1973-1975 of the sums specified in section 207, Representative Harsha plainly indicated his understanding that those sums nevertheless had to be allotted. For otherwise he would not have stated that "we can obligate or expend up to that sum," since only allotted sums may be obligated and spent.

Representative Harsha's discussion of "impoundment" under the Federal Highway Act, reproduced at page 17 of the Government's brief, also indicates that control over the rate of spending was not to be exercised at the allotment stage. It had always been the Government's position that spending control under the Highway Act could be exercised at the obligation stage, but that the allotment of funds was nondiscretionary. *See State Highway Comm'n of Missouri* v. *Volpe,* 479 F. 2d 1099, 1107 n. 8 (8th Cir. 1973); *and* HEARING ON EXECUTIVE IMPOUNDMENT OF APPROPRIATED FUNDS BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE SENATE COMMITTEE ON THE JUDICIARY, 92nd Cong., 1st Sess. 80 (1971) (testimony of F. C. Turner, then Federal Highway Administrator). The Government concedes as much here. *See* Pet. Br., p. 27. Thus, it cannot be gainsaid that, in saying that spending control can be exercised under the Federal Water Pollution Control Act by the "same means" utilized under the Highway Act, Representative Harsha was referring to control exercised at the obligation stage.

There is no doubt that in using the words "obligate" and "expend" the Representatives were using with discrimination the words of contract authority funding. The reference to the highway statute confirms this conclusion. These were veteran legislators. The conferees among them had been through hearings before a House committee and prolonged and detailed Conference Committee deliberations.* Under these circumstances, the failure expressly to disavow any effect on allotment only reflects the fact that no one conceived of any such effect.

An explanation Representative Harsha offered on the Act's fiscal impact bears out that conclusion. After calling attention to a table showing that the first major impact of "the $5 billion" authorized for fiscal 1973 would be in fiscal 1975, he said:

> "As a matter of fact, for fiscal year 1973 *if all the money were obligated* and placed under contract, there would only be $20 million needed to meet the obligations and in fiscal year 1974 there would only be the necessary appropriation of $250 million. Obviously there is not a severe impact on the economy for the next 3 years under this legislation."

118 Cong. Rec. H 9122 (daily ed. October 4, 1972). (Emphasis added.) Plainly, when Representative Harsha spoke hypothetically of the obligation of "the" $5 billion authorization in fiscal 1973, there was an underlying assumption that the entire $5 billion would be available for obligation by allotment in that year. In describing the potential

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* *See* Senator Muskie's remarks quoted in the footnote at page 16 of the Government's brief.

spending impact, therefore, he spoke only in terms of obligation, not allotment.

A further statement by Representative Harsha when override of the veto was being considered removes all doubt:

> "I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications and estimates. *This is the pacing item in the expenditure of funds.* It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures."

Id. at H 10268 (daily ed. October 18, 1972). (Emphasis added.) Approval of "plans, specifications, and estimates" occurs when applicants seek under section 203(a) the *obligation* of allotted sums. Thus, Representative Harsha once again stated quite clearly his understanding that the Administrator's discretion to "pace" obligations, *i.e.*, to regulate the rate of spending, obtains after allotment.

Moreover, when the House on October 18, 1972 took up the bill after the veto, it is reasonable to assume that Representative Harsha and his fellow conferees from the House were aware of Senator Muskie's unequivocal statements of October 4 and 17 that the authorized amounts must be fully allotted in fiscal years 1973-1975. Yet, as in the Senate, no one disputed or even questioned that conclusion. *See* p. 12, *supra*.

(3) *The Veto Message.*

The President too seems to have construed the Act (in October of 1972) as conferring less power on the Executive than indicated by his directive a month later that the Administrator allot $5 billion instead of $11 billion. The veto message (118 Cong. Rec. S 18534 (daily ed. October 17, 1972)) spoke only of the bill having "technical controls" which conferred "a measure of spending discretion and flexibility." The "political realities" and "pressure for full funding . . . approaching the maximum authorized amount" which he referred to are more easily understood as bearing on the obligation stage—when state and local governments had fully planned particular projects—than on the preliminary and general allotment stage. The experienced conferees, in finally reaching an accommodation on the statutory language, presumably took political realities into account and were willing to accept any resulting dilution of the Administrator's control over the rate of spending that might result from political pressures.

POINT II

Discretion over allotment is inconsistent with the purposes and objectives of the Act.

In addition to the legislative history of the Harsha Amendments, the overall intent of the Act demonstrates convincingly that Congress did not intend to confer discretion at the allotment step of the funding mechanism. After a careful examination of the congressional reports and debates (11A-19A) the Court of Appeals concluded that Congress "manifest[ed] an intent to create a procedure which would *insure* that the total authorized funds would be made available to the states" 18A. (Emphasis added.) That conclusion is indeed inescapable. There are innumerable instances in the legislative history (recited in full in the opinion below) when Senator Muskie, Representative Harsha and other key legislators expressed the intent

to commit $18 billion to the states during the fiscal years 1973-75, to assist them in complying with the Act's standards and deadlines. Senator Muskie's remarks of October 4, 1972 are typical of these statements:

> "[T]hose who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this crisis.
>
> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that *a total of $18 billion had to be committed by the Federal Government in 75 percent grants to municipalities during fiscal years 1973-1975.* That is a great deal of money; *but that is how much it will cost to begin to achieve the requirements set forth in the legislation.*
>
> • • • •
>
> [T]here were two strong imperatives which worked together to convince the members of the conference that this much money was needed: first, the conviction that only a national commitment of this magnitude would produce the necessary technology; and second, the knowledge that a Federal commitment of $18 billion in 75-percent grants to the municipalities was the minimum amount needed to finance the construction of waste treatment facilities which will meet the standards imposed by this legislation.
>
> • • • •
>
> Mr. President, to achieve the *deadlines* we are talking about in this bill we are going to need the strongest

> kind of evidence of the Federal Government's commitment to pick up its share of the load. We cannot back down, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill. And the conferees are convinced that *the level of investment that is authorized is the minimum dose of medicine that will solve the problems we face.*"

118 Cong. Rec. S 16870-71 (daily ed. October 4, 1972). (Emphasis added.) The Administrator now also concedes, for the first time in this litigation, that it is "the Congressional intent that the full $18 billion authorized be expended on the program . . . ." Pet. Br. at p. 26.

The need for such a federal commitment becomes evident upon an examination of the Act's purposes and objectives. The Act declares in its very first section that "it is the national goal that the discharges of pollutants into the navigable waters be eliminated by 1985." Section 101(a)(1). To effectuate this goal Congress has provided that "except as in compliance [with the Act's provisions] . . . the discharge of any pollutant by any person shall be unlawful." Section 301(a). Attainment of certain waste treatment standards is required "in order to carry out the [Act's] objective" of eliminating pollutant discharges. Section 301(b). For publicly-owned sewage treatment works these standards include application of secondary treatment* by July 1, 1977 and of "the best practicable waste treatment technology over the life of the works" consistent with the

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* In primary treatment solid matter is settled out of sewage in sedimentation tanks. In the secondary treatment which follows, the sewage is placed in an aeration tank where microorganisms break down and consume waste matter which remains suspended in the sewage.

goals of the Act by July 1, 1983. Sections 301(b)(1)(B), 201(g)(2)(A).*

There is no way under the Act that state and local governments can opt out of this particular federal program. They must follow the course charted by Congress. Yet, after years of neglect, attainment of the prescribed standards *within the stated deadlines* is far beyond the resources of already strained municipal purses. This Congress recognized. Thus, in fashioning the Title II grant program, it was the congressional intent to assure federal aid which would substantially assist states and localities in their compliance efforts. *See,* FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1971, S. Rep. 92-414, 92nd Cong., 1st Sess. 35 (1971). A serious flaw in earlier programs was the lack of any such firm federal commitment, coupled with a perennial gap between federal authorizations and appropriations *Id.* at 5. The Title II grant program was accordingly designed to bind the federal government to provide such assistance and thereby to encourage the sustained planning and construction at the local level needed to achieve the Act's objectives within the stated deadlines. *See,* SENATE COMMITTEE ON PUBLIC WORKS, WATER POLLUTION CONTROL LEGISLATION, 92nd Cong., 1st Sess., pt. 1 at 521 (1971).

It is in this context that the Administrator's argument for discretionary allotment must be evaluated. It quickly becomes evident that such discretion is totally inconsistent with the purposes and objectives of the Act. Allotment

* Prior to the adoption of the Act in 1972, discharges from municipal sewers were not effectively controlled by federal water pollution legislation. For example, the discharges of municipalities were exempted from the prohibition of the Rivers and Harbors Act of 1899, 42 U.S.C. § 407. *United States* v. *Lindsay* 357 F. Supp. 784 (E.D.N.Y. 1973).

controls the total amount of money available to be spent. Discretion over allotments, even under the Government's new construction (*see,* Pet. Br., pp. 12-13, 24-27) of the Act permitting "initial" and "augmenting" allotments,* means that some of the sums authorized by section 207 conceivably may never be made available. The possibility of the permanent loss of unallotted sums is revealed in the Justice Department's letter to Senator Muskie, referred to at pp. 12-13 of the Government's brief as the basis for the construction adopted by the Administrator here:

> [T]he . . . statutory language [of section 205(a)] [means] that the President's best judgment under circumstances prevailing at the time as to the amounts that may be prudently allotted should be exercised by the statutory time limits. However, changed circumstances following those dates [specified in section 205 (a)] *might justify subsequent allotment of additional funds within and for the fiscal years specified,* in the President's discretion.

JOINT HEARINGS ON IMPOUNDMENT OF APPROPRIATED FUNDS BY THE PRESIDENT BEFORE THE AD HOC SUBCOMMITTEE ON IMPOUNDMENT OF FUNDS OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS AND THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE SENATE COMMITTEE ON THE JUDICIARY, 93rd Cong., 1st Sess. 840-41 (1973) (letter of Deputy Attorney General Sneed). (Emphasis added.)** If this inter-

* We refute the Administrator's contentions regarding this construction of the Act in Point III, *infra.*

** The Administrator here restates the Government's position in somewhat stronger terms than the Justice Department's letter would seem to permit. He contends that a subsequent allotment can be made *"at least* until the time when reallotment of funds not utilized was required under Section 205(b)." Pet. Br. at pp. 12-13 (footnote omitted). (Emphasis added.)

pretation of the Act is correct, it would appear that the $3 billion not allotted for fiscal year 1973 is already lost, because the fiscal years "specified" for that allotment by section 205(b) were fiscal years 1973 and 1974. Plainly then, the discretionary power to reduce allotments, to the extent that it carries with it the possibility of the loss of some of the sums authorized by section 207, contravenes the congressional intent to commit $18 billion to the states.*

Moreover, even absent the possibility of lapse, discretionary allotment would render impossible the local planning efforts that Congress intended to encourage with its firm commitment of $18 billion over three fiscal years. By making "initial" and periodic "augmenting" allotments the Administrator would, in effect, make money available to the grant program from time to time in the same manner as Congress might have under an ordinary authorization-appropriation process. Yet both houses rejected authorization-appropriation funding in favor of the more binding commitment represented by contract authority. *See,* 117 Cong. Rec. S 17445-47 (daily ed. November 2, 1971); 118 Cong. Rec. H 2721-2731 (daily ed. March 29, 1972). In the House debates on the subject Representative Harsha explained why a procedure for periodic funding of the grant program would be unacceptable:

* It should also be noted that the Administrator's attempted reconciliation of discretionary allotment with section 206(f)(1) (Pet. Br., pp. 28-29) only succeeds if it is conceded that there is no possibility of a reduction of the $18 billion by lapse. If a lapse can occur, as the Government seems to indicate, then a state's "expected allotment" under section 206(f)(1) cannot be ascertained. In such case the reasoning of the Court of Appeals holds: section 206(f)(1) would have "scant operative effect" if there were discretionary allotment. 33A.

"Because of the magnitude of this program, it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants, including the sale of bonds that they have to sometimes negotiate.

Now, this can only be accomplished if there is assured availability of Federal grant funds for future years. This necessary assurance is not provided by merely advancing appropriations for 1 year. That will not meet the needed assurance of long-term planning. This is a continuing program.

• • • •

The construction of a waste treatment plant consists of planning; economic and engineering feasibility studies; preliminary engineering for the preparation of plans, specifications, and estimates; the acquisition of land where appropriate; and the actual physical construction of the building itself. Under this legislation each one of these steps is ordinarily a separate project, a separate contract, and it is funded as completed or as work progresses. This is not the case under existing law where 25 percent of the total project must be completed before any payment can be made.

At the time any one of these preliminary steps is taken, such as the plans, specifications, and estimates, there is no *assurance that appropriated funds would be available* for subsequent projects for land acquisition and the actual building of this plant for which the plans, specifications, and estimates are being prepared. *This, therefore, makes the orderly continuous planning and scheduling of work impossible.*"

118 Cong. Rec. H 2727-28 (daily ed. March 29, 1972). (Emphasis added.)

Representative Harsha recognized, then, that "orderly continuous planning and scheduling of work [is] impossible" where "there is no assurance that . . . funds would be available" to help pay for all stages of a project. Under authorization-appropriation funding, of course, funds are not available until they are appropriated. Under the Act's contract authority funding, however, funds are available upon their allotment. Section 205(b)(1). Thus, planning depends directly upon allotment. Indeed the Administrator himself recognized this crucial fact in his petition for a writ of certiorari (p. 7), where he expressed concern that "allotments once made cannot be withdrawn, even if the Administrator's position is ultimately sustained on the merits, because of the reliance by the states on available allotments in their planning process."

If a state must wait for periodic allotment determinations by the Administrator, the level of funding needed to pay the state's share of a project will be uncertain. There would arise from such uncertainty, for example, obvious difficulties for state budget preparation and for the submission of a bond proposal to a referendum, where necessary. Yet section 204(a), in conjunction with sections 208 and 303(e), requires, as a condition of grant application approval, that states have a continuing planning process covering such matters as requisite financing measures, construction schedules and construction priorities. There is no way states and localities can effectively plan in these areas when the level of available federal funding is always changing.

Furthermore, discretion over allotments, even if it includes the power to make subsequent "augmenting" allotments, would totally frustrate the congressional mandate that certain standards be achieved within specific deadlines. It was the clear legislative design that the Title II grants would provide substantial assistance to states and localities in complying with the Act within the limited time allowed. Reduced allotments, even if subsequently "augmented," will prevent timely project initiations and thereby negate the possibility that the Act's overall goals will be attained in the time envisioned by Congress. And failure to achieve these goals in a timely manner subjects a municipality to the civil and criminal penalties set forth in the Act. *See, e.g.*, §§ 309, 505.

Thus, although the Administrator is correct in stating that control of allotment can be used to affect the rate of spending (Pet. Br., p. 25),* such effect is merely incidental to the much broader consequences of discretionary allotment. As we have demonstrated, reduced allotments would impinge upon many areas of the statutory program in a manner not envisioned by Congress. Discretion at the obligation stage, however, confers control over the rate of spending without destroying the credibility of the federal commitment and disrupting the continuity of planning that is essential to the program's success.

It is at the obligation stage that the Administrator must make the project assessments required by section 204(a), including an evaluation of the project under the section 208 and 303(e) plans. No funds are committed for expenditure, of course, until a project is approved pursuant to section 203. At this stage the Administrator can consider

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* *But see* our discussion at p. 12, *supra*.

all factors pertinent to expenditure without disturbing other important areas of the statutory scheme, such as planning. Rather, planning can be conducted by the states and localities with the knowledge that a specific, and constant, sum is available for obligation. It was thus entirely logical and consistent for Congress to confer control over the rate of spending at the obligation stage, while directing that $18 billion be made available at the outset of the program to guide local planning efforts.

POINT III

The Act and its legislative history negate the concept of "augmenting" allotments and the asserted power of the Administrator to choose the stage at which to exercise control over the rate of spending.

The thrust of the Administrator's argument here is that the Act can be—and should be—construed in a manner which reconciles discretionary allotment with the clear congressional intent that $18 billion be committed to the states.* To effectuate this reconciliation, the Administrator

* The Administrator's reliance on the deletion of the word "all" from section 205 (Pet. Br., pp. 22-23) adds nothing to his argument. As the Court of Appeals observed (20A), no conclusion can be drawn from this "syntactical change" without first studying its legislative history. We have already shown (pp. 8-17, *supra*) that the legislative history of this change demonstrates that it was made solely to emphasize the Administrator's power to control spending at the obligation stage.

Similarly, the Administrator's contention (Pet. Br., pp. 14-15) that the "not to exceed" language in section 207 confers discretion over allotments must fail because of the absence of any indication that Congress intended that language to have such effect. In discussing a 1970 appropriations bill (H.R. 1311, which was never enacted) which would have affected the Vocational Education Act of 1963 (20 U.S.C. §§ 1241-1391) by appropriating "not to exceed" a fixed sum, then Assistant Attorney General William H. Rehnquist concluded that "in the absence of any positive evidence that the intended effect of this ["not to exceed"] language is to permit the Commissioner [of Education] to allot less than the full sum in accordance with the statutory formula, we would still view these sums as not subject to impounding." HEARINGS BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE SENATE JUDICIARY COMMITTEE, EXECUTIVE IMPOUNDMENT OF APPROPRIATED FUNDS, 92nd Cong., 1st Sess. 289 (1971).

It is noteworthy that the Harsha Amendments consistently were characterized as merely "emphasizing"—as opposed to broadening—the Administration's control over the rate of spending. Once this is understood, it becomes clear that the words "not to exceed" merely serve to emphasize that an authorization is just that—permission to appropriate but not a requirement to appropriate. The Administrator may, of course, within the bounds of his discretion, *obligate* less than the sums available for obligation, in which case Congress will not be called upon to appropriate the full amount of the sums authorized. In essence, Congress has extended a line of credit to the Administrator: it has allowed him to commit "not to exceed" $18 billion. But since the Administrator can commit (*i.e.*, obligate) only allotted sums, it is clear from the face of the statute that $18 billion must be allotted.

contends that after a reduced "initial" allotment he may make subsequent "augmenting" allotments until the full $18 billion is "ultimately" allotted. Pet. Br., pp. 24-27. Since the $18 billion will be "ultimately" allotted, the Administrator continues, there is no "practical difference" between control over the rate of spending exercised at the allotment stage or at the obligation stage. Pet. Br. at p. 27. Finally, the Administrator asserts that the choice of whether to exercise spending control at the allotment or obligation stage should be left to his expert judgment. Pet. Br., pp. 29-30.

There is, however, absolutely no basis for the Administrator's reading of the Act. In support of the contention that he may make "initial" and "augmenting" allotments, the Administrator can point to no language in the statute, no discussion in the committee reports, no remarks in the legislative debates. Rather, he merely states that "there

is nothing in the statute which indicates any congressional intention to preclude the Administrator from subsequently allotting sums not initially allotted during the year for which the sums were authorized." Pet. Br. at p. 26. But "legislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber* v. *Allen,* 396 U.S. 168, 186 (1969) (Harlan, J.). Indeed, under the theory of statutory construction advanced by the Administrator, Congress must affirmatively legislate against every possible action by an administrative official that it does not intend, or risk having its silence read as authorization. *Reductio ad absurdum,* the more removed the administrative action is from the statutory scheme, *i.e.,* the more unforeseeable, the less likely that Congress will legislate against it and, hence, the stronger the argument for its "authorization by silence."

There is, in any event, abundant evidence in both the Act and its legislative history that Congress intended that the full $18 billion be made available by allotment in the three years specified in section 207, and not at some indefinite later time. Section 205(a) provides, *inter alia,* that:

> Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972.

Quite plainly, section 205(a) conceives of only one allotment for each fiscal year authorization. Subsequent

"augmenting" allotments would violate the clear command that allotment *shall* be made "not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized." Moreover, the statute speaks in terms of "the" allotment, further indicating singularity. It is well-established that when a statute provides that something be done one way, all other methods are excluded. *See, Botany Worsted Mills* v. *United States,* 278 U.S. 282, 289 (1929).

It is also significant that, while Congress carefully provided, in section 205(b)(1), for the contingency of less than full obligation of allotted sums, it made no provision concerning less than full allotment of authorized sums. Plainly, the reason for this "omission" was that the latter contingency was never envisioned.

We have already shown that the legislative history fully supports our reading of section 205(a). *See* pp. 17-26, *supra.* The congressional debates are replete with statements by sponsors and other legislators that the $18 billion would be allotted in the three fiscal years ending in fiscal year 1975. *See* 13A-18A. Obviously Congress never contemplated allotments beyond the years enumerated, as would be the case with subsequent "augmenting" allotments; otherwise those legislators would not have repeatedly spoken with such certainty of a three-year allotment period.

Thus, the question of the "practical differences" between spending control at the allotment and obligation stages is not even pertinent here, for the Act does not leave room for the construction advanced by the Administrator. But even if such an interpretation of the Act were plausible,

there would be serious "practical differences" arguing against it, as we have demonstrated. *See* pp. 20-26, *supra.*

Finally, the Administrator contends that the Court should defer to his expert judgment and permit him to choose at what stage in the funding mechanism to exercise spending control. Pet. Br., pp. 29-30. Assuming, again, that it were even arguable that the Act might permit the exercise of discretion at the allotment stage, the Administrator still cannot overcome the clear legislative intent of the Harsha Amendments (*see* POINT I, *supra*) that rate of spending control may only be exercised at the obligation stage. The proper test is not what construction the Administrator prefers among those theoretically possible, but what did Congress actually intend: "We are reluctant to attribute such intent to Congress and, simply in the name of administrative expertise, to follow a path not marked by the language of the statute." *Zuber* v. *Allen, supra,* 396 U.S. at 181.

CONCLUSION

The judgment of the Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1973
Nos. 73-1377, 73-1378

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK;
CITY OF DETROIT, Party Plaintiff, *Respondents.*

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

CAMPAIGN CLEAN WATER, INC., *Respondent.*

Brief of the California Attorney General as Amicus Curiae in Support of Respondents' Position That Petitioner Illegally Reduced Allotments to States as Required to Be Made by the Federal Water Pollution Control Act Amendments of 1972

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Introduction

"There presently exists a 'wait and see' mood on the part of State and local governments. . . . This stagnant condition will be compounded by the uncertainty that will be bred by a Presidential disagreement with Congress over the content and direction of the Federal program. More important-

ly, it will counter the President's demand that we 'not slacken our pace, but accelerate it.'

"We will be confronted by the inequity of trying to pursue, through enforcement means a control program against industrial dischargers, while failing to fund municipal plants on the same stream, and not controlling those industrial wastes discharged through municipal plants. As the President stated, 'A river cannot be polluted on its left bank and clear on its right. In a given waterway, abating some of the pollution is often little better than doing nothing at all, and money spent on such partial efforts is often largely wasted.' [Footnote omitted.]

"Finally, we can anticipate many groups questioning the degree of Federal commitment and interest, and the Federal Government's ability to provide stable and effective leadership. The momentum of awareness and action will not be sustained and the attainment of the President's goal of 'true quality of life in America' will be hindered. . . . Program delay and indecision have become common. As the President said, 'as we strive to expand our national effort, we must also keep in mind the greater cost of not pressing ahead.' [Footnotes omitted.]

". . . .

"EPA is not unmindful of the limited resources that the Federal Government can apply to its important programs. It is a constraint that fades many hopes. . . .

"But countervailing this concern are the consequences of failure to meet our national need in this area. *More so than any other, water is our most important national resource. It sustains our industry, our farms, our commerce, our enjoyment, our lives. It is also most unforgiving if it is abused.* The effects linger and, if continued, multiply.

"It seems reasonable to me to spend less than 1% of the Federal budget and two tenths of 1% of the Gross National Product over the next several years to assure for future generations the very survival of the Gross National Product." Letter from William Ruckelshaus to The Office of Management and Budget, October 11, 1972, recommending Presidential Approval of the Federal Water Pollution Control Act Amendments of 1972, "A Legislative History of the Water Pollution Control Act Amendments of 1972," Public Works Committee, 93rd Cong., 1st Sess., Serial No. 93-1 (1973). (Emphasis added.)

Despite the strong and eloquent recommendation of the President's own appointee as Administrator of the Environmental Protection Agency, the President vetoed the Federal Water Pollution Control Act Amendments of 1972 (hereinafter FWPCA). Congress, however, expressing a strong sense of commitment to cleaning the nation's waters, overrode the President's veto.

The decision to spend $18 billion for waste treatment plants was not an easy one for Congress. It was a carefully weighed decision, with much thought given to the potential inflationary effect on the economy. The cost of cleaning our waters is great. It was determined, however, that in terms of destroying all hope of saving the quality of our waters, a weak commitment on the part of the federal government would have even a greater cost.

Ultimately, our national priorities must be established by the People, speaking through their legislative representatives. Congress has spoken. It is now up to the courts to effectuate that decision so that the task of cleaning our nation's waters may begin.

Statement of the Case

The facts out of which this case arises are aptly summarized by District Court Judge Merhege in *Campaign Clean Water v. Ruckelshaus.* (TT. Appendix pp. 80A, 81A.)

It is significant to note that since the reduction of allotments, five out of six District Court judges who have ruled upon the issue of the amount of allotments made under the FWPCA have ruled in favor of plaintiffs:

City of New York v. Ruckelshaus, ... F.2d .... (D.C. Cir.), 358 F. Supp. 669 (D. D.C. 1973), 5 ERC 1305;

Anthony R. Martin-Trigona v. William D. Ruckelshaus, ... F. Supp. .... (N.D. Ill. 1973), Civil Action No. 72-C03944, 5 ERC 1665, summary judgment entered in favor of plaintiff finding act of allotment ministerial;

Campaign Clean Water, Inc. v. Ruckelshaus, 489 F.2d 492 (4th Cir. 1973), 361 F. Supp. 689 (E.D. Va. 1973), 5 ERC 1441, plaintiff's motion for summary judgment granted finding discretion in making allotments but holding discretion abused; Court of Appeals remanded with directions to take evidence on abuse of discretion;

George [illegible]. Brown, Jr. v. Ruckelshaus, and *City of Los Angeles v. Ruckelshaus,* 364 F. Supp. 258 (C.D. Cal. 1973), 5 ERC 1803 (1973), motion to dismiss on standing issue granted (Judge Hauk also addressed the merits and sustained the "impoundment");

State of Minnesota v. United States Environmental Protection Agency, et al., D. Minn., No. 4-73 Civ. 133, 5 ERC 1586 (1973), plaintiff's motion for summary judgment granted; appeal pending;

State of Maine, et al. v. Robert W. Fri, et al., D. Maine, Civil Action No. 14-51, the District Court entered a preliminary injunction requiring allotment of funds; the Court of Appeals for the First Circuit affirmed (.... F. 2d ...., 5 ERC 1991 [1973]).

The Issue

At the beginning it should be made clear that we do not view the case before us as one involving an impoundment of funds. It is actually a far more serious case.[1] When funds are impounded they are retained and may accumulate for later use. By not making the initial allotments to the states the federal commitment has been cut back and without additional legislation those funds will never be made available to the states.

A complicated funding procedure was set forth in the FWPCA. The six-step procedure is aptly set forth

[1]The Court of Appeals for the District of Columbia Circuit, while ruling as California urged as a friend of the court that the allotment of funds was a purely ministerial act, refused to pursue what it considered the "semantic argument" we presented as to the distinction created by the unique funding mechanism. *New York v. Train,* Combined Appendix pp. 7A, 8A. The distinction between flexibility at the obligation stage and a refusal to make full allotments is not, however, a semantic distinction but has a substantive effect.

by the Court of Appeals for the District of Columbia in *New York v. Train*. (Appendix p. 6A.) The first step is really a bookkeeping procedure. The Administrator, according to standards of a state's need as set forth in the Act, each year allots amongst the states the amount of money which will eventually be made available to them. Though no money changes hands at this stage, the states then can rely on eventually obtaining a fixed share of the federal funds for the program.

The issue, then, before this Court is whether the allotment to the states of the funds authorized to be appropriated is a ministerial act. This has been treated as the central issue in every case involving the reduction of allotment except *Campaign Clean Water, Inc. v. Train*. The failure of plaintiffs in the *Campaign Clean Water* case to fully address this issue renders the opinions in that case of little value. The crucial error made by plaintiffs in *Campaign Clean Water* was in incorrectly conceding that Congress intended to give the executive certain discretion in making allotments. It is that concession with which we do not concur and which skews the result in the Fourth Circuit's decision.

Statement of Interest

Imposed upon the states by the FWPCA are certain specific duties in regard to waste treatment. Section 301(b)(1)(B) requires publicly owned treatment plants within certain time periods to meet effluent limitations based on secondary treatment. By July 1, 1983,

all publicly owned treatment plants are required by section 301(b)(2)(B) to provide for the "best practicable" waste treatment technology. A tremendous amount of money will have to be expended by California to comply with these congressional mandates.

One of the four national policies stated in the Act is the "national policy that federal financial assistance be provided to construct publicly owned waste treatment works." § 101(a)(4). It was the intent of Congress in enacting Title II of the FWPCA to assist states in development of the waste treatment management plants necessary to achieve the water quality goals of the Act. That was why $18 billion was authorized by Congress to be appropriated as grants for construction of waste treatment plants.

By the Administrator's refusal to allot the full amount of funds authorized to be appropriated, California stands to lose a total of $948,300,000 in construction grants for 1973, 1974 and 1975, California's share of the federal allotment being 9.8176%. 37 Fed. Reg. 6282 (Dec. 8, 1972); 38 Fed. Reg. 5331 (Feb. 28, 1973); 39 Fed. Reg. 5257 (Feb. 11, 1974). Without those funds the citizens of California, in order to meet the standards established by the Act, will have to bear a substantial economic burden which Congress intended the federal government to share.

The Attorney General is the chief law officer of the State of California. (Cal. Const. art. V, § 13.) He has been delegated by the California Legislature the

responsibility of providing the people of the State of California with an adequate remedy to protect the natural resources of the State of California from pollution, impairment or destruction. (Cal. Gov. Code § 12600(b).)

To protect the waters of the State of California and insure compliance with the FWPCA and our own State Water Quality Act (Cal. Wat. Code § 13000 *et seq.*), it is in the best interest of the public for the California Attorney General to support the position of the City of New York in order to secure allotment of the full amount of funds authorized by Congress in the FWPCA.

Summary of Position

It is the position of the State of California that:

1. These cases present a justiciable controversy which is not barred by the doctrine of sovereign immunity;

2. The President only has such powers to refuse to allot or spend funds as is express or implied in the authorizing legislation;

3. Section 205(a) of the FWPCA states that sums authorized to be appropriated *shall* be allotted. The history of sections 205(a) and 207 of the FWPCA demonstrates the congressional intent that all funds authorized for appropriation for waste treatment plants be allotted to the states. Allotment of funds, according to a formula based on need for waste treatment plants, is a ministerial act;

4. Under the funding procedure established by the FWPCA it is at the subsequent obligation stage that the Administrator has some discretion as to when funds will be spent. Once funds have been allotted, however, they will eventually be spent as they are carried over from year to year;

5. If it is concluded that the Administrator does in fact have some discretion as to the amount allotted, he has abused that discretion in allotting only some 55% of the funds authorized for appropriation in 1972 and 1973;

6. To allow the reduction of the allotment to stand would frustrate the will of Congress and violate the constitutional doctrine of separation of powers.

ARGUMENT

I

This Case Presents a Justiciable Controversy Which Is Not Barred by the Doctrine of Sovereign Immunity

In all of the litigation arising out of the reduction of allotments under the Federal Water Pollution Control Act, the Administrator has contended that the facts fail to present a justiciable case or controversy and involves a non-justiciable political question. Furthermore the Administrator contended, as he now contends, that this case is barred by the doctrine of sovereign immunity. Several of the judges in the cases below have treated the contentions of the Administrator on this point at length and concluded that this case presents a justiciable controversy which is not barred by the doctrine of sovereign immunity. Even Judge Hauk, the only District Court judge who ruled in favor of the Administrator, held that although this may be a political case it is not a political question and therefore is justiciable. *Brown v. Ruckelshaus,* 364 F. Supp. 258, 262-63 (C.D. Cal. 1973), 5 ERC 1803, 1805. This certainly is no more of a political case than the first major impoundment case, *Kendall v. United States,* 37 U.S. 524 (1838). As stated in *Baker v. Carr,* 369 U.S. 186, 211 (1962):

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. . . ."

Just such a matter is presented in this case. For a good summary of the role played by the judiciary in the question of impoundment of funds see *Presidential Impounding of Funds: The Judicial Response,* 40 U. Chi. L. Rev. 328 (1973).

Petitioner contends that this suit is barred by the doctrine of sovereign immunity because the requested relief will lead to the expenditure of government funds. Petitioner relies upon *Dugan v. Rank,* 372 U.S. 609 (1963). What petitioner fails to realize is this case is within the exception to the general rule stated in *Dugan v. Rank.* In that case the Court indicated that a suit could be brought against a United States officer when the action challenged allegedly exceeded the officer's statutory authority, or if within the scope of authority was premised upon a power which is unconstitutional. *Dugan v. Rank, supra,* at 621.

Furthermore as stated in *Martin-Trigona v. Ruckelshaus,* .... F. Supp. .... (N.D. Ill. 1973), 5 ERC 1665, 1666:

> "It should be noted at the outset that the relief sought by the plaintiff does not require the expenditure of unappropriated public funds nor does it require the obligation of appropriated funds. The plaintiff is not seeking a determination of whether or not the Administrator is required to spend a given amount of money for his sewage treatment. Rather plaintiff is seeking a judicial declaration that would require the Administrator to perform what plaintiff alleges to be a purely ministerial duty under the Act. (Viz. that of allotting—and thus making *available* for obligation—

the sums authorized to be appropriated by Sec. 207 of the Act.)" (Emphasis in original.)

Also supporting the decision that this claim is not barred by the doctrine of sovereign immunity is a very important impoundment case: *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973).

It is clear that this case presents a justiciable controversy which is not barred by the doctrine of sovereign immunity. We, therefore, proceed to examine the merits of the proposition that the Administrator does not have the discretion to reduce allotments of funds authorized to be appropriated for construction of waste treatment plants.

II

The Legislative History of Sections 205(a) and 207 of the Act Indicates Congressional Intent That All Funds Be Allotted, Though Flexibility Was Given the Administrator Concerning What Is Actually Spent in Any One Year

Section 207 of the FWPCA established the maximum funds authorized to be appropriated for 1973, 1974, and 1975.

> "There is *authorized to be appropriated* to carry out this title . . . for the fiscal year ending June 30, 1973, *not to exceed* $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000." (Emphasis added.)

Section 205(a) of the Act mandates that funds authorized to be appropriated under section 207 be

allotted among the states by the Administrator prior to January 1, immediately preceding the fiscal year in which it is to be appropriated.

> "Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, *shall be allotted* by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year. . . ." (Emphasis added.)

By letter dated November 22, 1972, President Nixon informed Administrator Ruckelshaus:

> "*I direct that you not allot* among the States the maximum amounts provided by section 207 of the Federal Water Pollution Control Act Amendments of 1972. No more than $2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974 should be allotted. . . ." (Emphasis added.) (*See* App. Br., Ct. of Appeals, *New York v. Fri*, Appendix pp. 15A-16A.)

The issue before this Court is whether the Administrator exceeded his authority in not allotting the funds authorized to be appropriated.

A. Action of Congress: A Sense of Commitment

Analysis of the legislative history of Title II of the FWPCA leads to the conclusion that Congress mandated the Administrator to allot among the states $5 billion for 1973 fiscal year, $6 billion for 1974 fiscal year, and $7 billion for 1975 fiscal year. The Administrator has some discretion at a later stage as to what is actually obligated, which in turn determines what would be appropriated, but not as to what part of the authorized funds may actually be allotted.

The report finally accepted by the Conference Committee and passed by Congress over the Presidential veto as previously discussed provides for a complicated funding procedure. Congress committed itself to providing 75% of the cost of constructing certain needed waste treatment management works. (§ 202.) The sums authorized to be appropriated are allotted amongst the states on the basis of need. (§ 205(a).) When the allotments are made the Administrator cannot possibly know how much or when the funds will later be appropriated. When the Administrator approves construction plans, a contractual obligation is created (§ 203), though the monies are expected to actually be spent over a seven-year period. Appropriations are then annually made by the Appropriations Committee based on the contractual obligations incurred by the Administrator. It is these appropriations which are not to exceed certain dollar amounts. The Administrator may decline to incur obligations on all the monies allotted to the states. Those funds which are not obligated within a year after the fiscal year in which they were allotted "shall be immediately reallotted by the Administrator". (§ 205(b)(1).) There is, therefore an important distinction between the procedures for fiscal flexibility provided for by Congress and the allotment reduction procedures directed by the President. Under the President's directive no funds will be carried over as allotted but not obligated. The President has cut off funds prior to the allotment stage, and thus substituted his judgment for that of Congress on what should be spent to clean our nation's waters over the next seven years.

In passing the FWPCA Congress was responding to an important problem discussed in the 1971 Subcommittee Hearings on Water Pollution where there was much concern about the inadequacies of existing legislation:

> "At a bare minimum the credibility of the existing federal commitment must be reestablished by backing words of authorization with monies of appropriation. Whenever the nation seeks to encourage cities to plan and construct improvements which require many years to complete, the Congress must build reliability into its federal grant incentives. Major facilities cannot be stopped in midstream. A change in federal grant policy to establish a reliable commitment is vital but is not the only change that can and should be made in the federal legislative and regulatory approach to water pollution abatement." *Hearings on Water Pollution Control Legislation, U.S. Senate Committee on Public Works,* 92nd Cong., 1st Sess., pt. 1, at 521 (1971).

The general consensus during the first session of the 92nd Congress seemed to be that if the federal government was going to mandate state action to clean the nation's water, the federal government would have to bear part of the financial burden of accomplishing that task. States and local governments had strongly protested against the congressional imposition upon them of rigorous air quality standards under the Clean Air Act and Amendments of 1970 because the federal government did not at the same time provide funding to help the states and local governments meet those standards.

> "If Congress places upon State and communities the burden of carrying out this program, it should bind itself to pay the Federal share of the

project costs. The authority for obligation will not bar the Committee on Appropriations from reviewing the manner in which the program is being carried forward." 2 U.S. Code Congressional and Administrative News, Pub. L. 92-500, p. 3702 (1972).

Discussing section 207 of the FWPCA (erroneously referred to below as subsection (b)), the Subcommittee on Air and Water Pollution ultimately concluded:

"The language of subsection (b) [*sic*] of Section 207 provides that funds authorized for fiscal years 1973, 1974, and 1975, shall be available for obligation by contract upon their allocation to the States. The importance of assured Federal financial support to the achievement of the objectives of this title and to our national purpose of cleaning up polluted waterways cannot be overstated. The task is a massive one in terms of the work to be done and the funds to be expended." 2 U.S. Code Congressional and Administrative News, Pub. L. 92-500, p. 3701 (1972).

The subcommittee consistently voted against reducing the amount of the authorizations. The degree of the commitment to full funding felt by Congress is expressed in both Senate Reports and House Reports. In determining the intent of Congress in enacting a bill, it is particularly important to consider the views of the sponsors of the legislation. ***First Nat. Bank v. Walker Bank***, 385 U.S. 252, 271 (1966); ***City of Burbank v. Lockheed Air Terminal***, 411 U.S. 624, 637 (1973). Senator Muskie[2] in his report stated:

[2]Chairman, Senate Subcommittee on Air and Water reporting S 2770, floor manager for that bill and member of the Conference Committee.

"The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion *had to be committed* by the Federal Government in 75 percent grants to municipalities during fiscal years 1972-75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation. . . ." 118 Cong. Rec. S 16870 (daily ed. Oct. 4, 1972). (Emphasis added.)

"Mr. President, to achieve the deadlines we are talking about in this bill we are going to need the strongest kind of evidence of the Federal Government's commitment to pick up its share of the load. We cannot back down, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill. And the conferees are convinced that the level of investment that is authorized is the minimum dose of medicine that will solve the problems we face." 118 Cong. Rec. S 16871 (daily ed. Oct. 4, 1972).

Though the financial commitment was great, it is important to remember that actual cash outlay in the three years for which appropriations were authorized would be relatively slight because of the lag time between approval of a project and actual expenditure for construction.

According to Congressman Harsha:

"[T]he first major impact of obligations from the $5 billion authorizations for the fiscal year ending June 30, 1973, is in fiscal year 1975. During that year the appropriations required for payment for obligations authorized by this legislation would

only be $2,450,000,000. The appropriations will be spread out over the period of construction of these waste treatment projects and would not be felt in any appreciable sum until fiscal year 1975, some 2 or 3 years hence.

"As a matter of fact, for fiscal year 1973 if all the money were obligated and placed under contract, there would only be $20 million needed to meet the obligations and in fiscal year 1974 there would only be the necessity of appropriating $250 million. Obviously there is not a severe impact on the economy for the next 3 years under this legislation." 118 Cong. Rec. H 9122 (daily ed. Oct. 4, 1972).

Congress was concerned about the inflationary effect, but concluded that the dangers of such an effect were outweighed by the interest in cleaning up our waters.

The "sense of Congress" (a term used in the Federal-Aid Highway Act) was expressed by Senator Bayh when he stated:

"The conferees agreed to accept the House passed authorizations for grants to the States for the construction of waste treatment plants, including sewage collection systems. This is construction which is absolutely essential if we are to make any meaningful progress toward the national goals established in the bill. The total authorization for this purpose is $18 billion over the 3 fiscal years ending in 1975. There is no doubt that this money is needed, for without substantial authorizations he [*sic*] bill would be little more than a series of empty promises. The amounts

allocated for grants for construction of treatment works will be distributed to the States on the basis of need, with the Federal share of construction costs being 75 percent. . . ." *Supra* at S 16892-93.

The intent of the House to make an $18 billion commitment was just as clear as it was in the Senate. Congressman Harsha,[a] in his report to the House, reminded his colleagues:

"You may recall that the bill that passed this body last March called for authorizing a little more than $24.6 billion, the Senate bill authorized $20 billion, and the administration requested $6 billion. The conferees have agreed on essentially the same figures as in the House bill, $24.6 billion for the period through fiscal 1975. A total of $18 billion of this sum is for construction grants, and breaks down not to exceed $5 billion for fiscal 1973, $6 billion for fiscal 1974, and $7 billion for fiscal 1975.

"Naturally, the large difference in what the administration asked, and what the conference bill provides, raises the question of why the substantial discrepancy?

"There is only one answer to that and it is that if we set out to do this job there is no way we can accomplish it without paying the price. If we want clean water, we have to pay for clean water. If we want the States and cities to move aggressively ahead in building waste treatment plants they

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[a]Ranking minority member of House Committee on Public Works, which reported House version, floor manager for that bill and member of Conference Committee.

must have Federal aid, and they must have confidence that Washington will continue to live up to its commitments." 118 Cong. Rec. H 9130 (daily ed. Oct. 4, 1972).

B. The President's Veto: A Different Policy

After unanimous passage by the Senate and with only 11 dissents in the House, the FWPCA went to the President. The legislation, with its appropriations which had been subject to such close scrutiny by the Congress, was rejected by the President as inflationary. In his veto message to Congress on October 17, the President said:

> "I am compelled to withhold my approval from S. 2770, the Federal Water Pollution Control Act Amendments of 1972—a bill whose laudable intent is outweighed by its unconscionable $24 billion price tag. My proposed legislation, as reflected in my budget, provided sufficient funds to fulfill that same intent in a fiscally responsible manner. Unfortunately the Congress ignored other vital national concerns and broke the budget with this legislation."[4] Weekly Compilation of Presidential Documents, Vol. 8, No. 43, pp. 1531-32 (Oct. 23, 1972).

By exercising his constitutional prerogative of veto, the President fully expressed his disapproval of the congressional statement of policy as to how much money was needed to clean our waters.

C. Final Judgment of Congress: To Override the Veto

To the President's message both the House and the Senate, on October 17 and 18, responded by exercising their constitutional prerogative and overwhelmingly overriding his veto. In the discussion of the veto, Congress again expressed its conviction that the $18 billion was needed for allotment among the states to do the job. Senator Muskie said in response to Senator Scott's support of the President's concern about the budget

> ". . . But may I say to the Senator, when we pass a piece of legislation like this, with its requirements imposed on industry, with its requirements imposed on the States, with its requirements imposed on the local governments, the question that faces us then is, as we impose this commitment on them, what commitment are we prepared to accept on the part of the Federal Government?
>
> "This point was well debated in the Senate when we took up this bill. I made it clear, the

[4] It is interesting to note that according to former Administrator Ruckelshaus the difference between the amount which would have been authorized for appropriation in the Administration's bill submitted in 1971 (S 1013 by Senator Cooper) and that of the bill eventually passed, was not that substantial. In a letter by Ruckelshaus to President Nixon, urging the President to sign the bill, Ruckelshaus stated:

> "The total value of construction initiated in the near-term under the enrolled bill [S. 2770] is expected to correspond closely to the total value of construction that would have been initiated under the Administration bill. Under the Administration's proposal, communities were free to continue to initiate reimbursable projects, were not constricted by the $6 billion authorization, and could have substantially increased this amount. Reimbursable projects are precluded under the enrolled bill and the $18 billion contract grant authority represents a ceiling, while the Administration's $6 billion proposal represented a floor. With the projected close correspondence in total near-term value of construction starts, the potential inflationary impact upon the entire construction sector would be minimized." 118 Cong. Rec. S 18546 (daily ed. Oct. 17, 1972).

committee made it clear, that what we are asking of the Congress was a commitment that these people in other levels of government and the private sector could rely upon. Of course there is a commitment. The President 3 years ago, in his state of the Union message, said he had preempted the environmental issue and that he was making a commitment.

". . . The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation, and specifically studying how much money would be necessary to achieve the objective and goals of the act, as set forth in section 101(a)." 118 Cong. Rec. S 18548 (daily ed. Oct. 17, 1972).

Congressman Harsha likewise responded to the President's veto:

"To those who say that we cannot afford to start now on the restoration of our waters, on the scale that Congress believes is essential, I say that we dare not postpone this undertaking. Every day of inaction most certainly will add to the ultimate cost; another year of inaction may well destroy all hope of saving our environment.

". . . .

"Mr. Speaker, there is another point which I must raise, We have known all along that it would take a massive amount of money and time to reclaim and to protect our precious water resources. But, we dare not measure the cost of this water bill merely in terms of dollars alone. We cannot measure the wealth of our great natural resources in dollars alone—and if we wait

too long, all the dollars on earth won't buy back what we've lost. Under these circumstances, I am firmly convinced that the price of killing this water bill—of sustaining this Presidential veto—is far, far too costly.

". . . .

"Furthermore, the President maintained that a vote to override the veto of the Water Pollution Control Act Amendments of 1972 was a vote to increase the likelihood of higher taxes. So be it, the public is prepared to pay for it. To say we can't afford this sum of money is to say we can't afford to support life on earth.

". . . .

"This is not 'extreme and needless overspending'—to use Mr. Nixon's language. The moneys authorized are based on estimates made by his own administration. Furthermore, the bill sets up a new system of user charges, by which industrial users would return their share of operating and maintenance costs of waste treatment plants—an estimated $4.5 billion—to the Federal Treasury.

"Our economy can, and must, absorb the costs of pollution control. A March 1972 report of the President's Council on Environmental Quality on 'The Economic Impact of Pollution Control' notes that no real attempt has yet been made to quantify the benefits of a cleaner environment and that studies tend consequently to overstate the net costs to society.

"Mr. Speaker, this is perhaps the most important environmental legislation the Congress has yet enacted. The question is not, 'Can we afford to spend $18 billion over the next 3 years for

waste treatment plants?' but 'Can we afford not to?' . . ." 118 Cong. Rec. H 10267-68 (daily ed. Oct. 18, 1972).

The statements of Congressmen quoted above are but some of the plentiful language expressing Congress' intention that the full $18 billion be spent for water pollution control.

D. The Distinction Between Discretion in Allotment and in Obligation

Even more important in a suit on reduction of allotments than the general intent that the funds be spent is the evidence that both Congress and the President understood that sections 205(a) and 207 built in flexibility in the contractual obligation stage which effects *when* the money is spent, but not in the allotment stage, which determines whether the funds ultimately are spent. That the President was aware of some flexibility in spending is expressed in his veto message of October 17:

> "Even if this bill is rammed into law over the better judgment of the Executive—even if the Congress defaults its obligation to the taxpayers—I shall not default mine. Certain provisions of S. 2770 confer a measure of spending discretion and flexibility upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible." Weekly Compilation of Presidential Documents, Vol. 8 No. 43, p. 1532 (Oct. 23, 1972).

In his report to the Senate on the conference bill, Senator Muskie explained the purpose behind the language of sections 205(a) and 207:

> "In our last conference, the able and distinguished ranking minority member of the House Committee on Public Works offered two amendments which he indicated would reduce opposition to the bill from the White House and the Office of Management and Budget. These two amendments were accepted by your conferees and by other House conferees in order to remove the question of a veto on the basis of the money authorized by the legislation.
>
> "Under the amendments proposed by Congressman WILLIAM HARSHA and others, the authorizations for obligational authority are 'not to exceed' $18 billion over the next 3 years. Also, 'all' sums authorized to be obligated need not be committed, *though they must be allocated.*[5] These two provisions were suggested to give the administration some flexibility concerning the obligation of construction grant funds.
>
> "The conferees do not expect these provisions to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the act. At the same time, there may be instances in which the obligation of funds to a particular project in a particular State may be contrary to other public policies such as the National Environmental Policy Act. In these cases the conferees would, of course, expect the administration to refuse to enter into contracts for construction." (Emphasis added.) 118 Cong. Rec. S 16871 (daily ed. Oct. 4, 1972).

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[5]Allocated rather than allotted was the term which had been used in the Senate version of the bill.

Congressman Harsha made the same point to the House when they voted to override the President's veto:

> "Furthermore, Mr. Speaker, we have emphasized over and over again that if Federal spending must be curtailed, and if such spending cuts must affect water pollution control authorizations, the administration can impound the money.
>
> "I want to point out that the elimination of the word 'all' before the word 'sums' in section 205 (a) and insertion of the phrase 'not to exceed' in section 207 was intended to emphasize the President's flexibility *to control the rate of spending.*
>
> ". . . .
>
> "Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. This is the pacing item in the expenditures of funds. It is clearly the understanding of the managers that under these circumstances the *Executive can control the rate* expenditures." (Emphasis added.) 118 Cong. Rec. H 10268 (daily ed. Oct. 18, 1972).

The legislative history of sections 205(a) and 207 clearly indicates an intent to allow discretion in the rate of spending; making allotments of funds to the states, however, is solely a ministerial act.

The importance of the distinction between flexibility in the obligation stage and in the allotment stage was properly noted by Judge Gasch in *City of New York v. Ruckelshaus:*

> "Another feature of the Act which is of some importance in the resolution of issues before the Court is the reallotment provision in § 205(b)(1) of the Act. Once allotted to a State, sums are available for obligation for approved projects there 'for a period of one year after the close of the fiscal year for which such sums are authorized.' If for any reason the sums allotted are not fully obligated within that period, they are to be reallotted 'generally on the basis of the ratio used in making the last allotment of sums under this section.' Such reallotment sums remain available for obligation and are added to the State's allotment for the next fiscal year. Any sums authorized but not allotted at the appropriate time are lost to the State under the provisions of this Act. Thus, by refusing to allot the full sums authorized, the Administrator controls the absolute amount (as opposed to the rate) of spending without regard to the standards set forth in, e.g., § 204, for determining whether sums should be obligated." *New York City v. Ruckelshaus,* Appendix p. 62A.

Congress gave the administration flexibility in spending but did not intend to allow the Act to be gutted by making less than the allotments provided for by the Act. To accept the argument of petitioner, the Administrator would allow the President to substitute his judgment for that of Congress.

District Court Judge Merhege in *Campaign Clean Water* came to the conclusion that the Administrator had discretion to reduce allotment of funds but had

abused that discretion.[6] In coming to the conclusion on the discretionary aspect of the funding procedure, Judge Merhige relied on much the same language of legislative history by Congressman Harsha and Senator Muskie concerning deletion of the word "all" before the word "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207, which we contend were designed to give flexibility in the obligation but not the allotment stage.

Judge Merhege stated:

> "Judge Gasch in City of New York concluded from this language and other by-play that, in accordance with Senator Muskie's views, the discretionary elements incorporated into the Act and referred to by the various legislators were meant to apply to executive control over the 'rate of spending,' but that the rate of spending was to be monitored only at the obligation stage and not by the withholding of allotments.
>
> "This Court respectfully declines to adopt this interpretation, primarily because it appears to deemphasize the syntactical history of Section 205 which shows the purposeful removal of the word 'all' from § 205. While the legislative debates lend strength to Judge Gasch's conclusion, the Court, the plaintiff, and, to a limited extent, the defendant, are in agreement that legislative history is in

[6]On appeal the Court of Appeals noted that plaintiff "concedes that Congress intended to give the executive certain discretion in making allotments under Section 205." (Appendix p. 39A.) Plaintiff apparently made much the same concession in the trial court. (Appendix p. 96A.) It is that concession which is erroneous and which led that court astray. No such concession was made in *Train v. New York, supra,* enabling the court in that case properly to decide the issue.

> the main unclear, politically charged, and in the Court's view, to some degree based upon suspect constitutional interpretation of the powers of the President. In this context the syntactical history must be given great weight. See generally Gilbert v. General Electric, 347 F. Supp. 1058 (E.D. Va. 1972). The Court accordingly concludes that the Congress did intend for the executive branch to exercise some discretion with respect to allotments. Plaintiff, in fact, does not seriously dispute this conclusion, but contends that 'the Congress could not have intended to give the Administrator the discretion to gut the Act.' This latter contention merits close scrutiny." Appendix at 95A-96A (footnote omitted).

As previously noted, part of the problem in relying upon *Campaign Clean Water* is the acquiescences of plaintiff in the core concept that reduction of allotments was discretionary. Nonetheless, deletion of the word "all" from section 205(a) does raise some question as to the meaning of section 205(a) when read with section 207. The Court of Appeals for the District of Columbia Circuit in *City of New York v. Train* more properly dealt with the meaning of those amendments.

> "We now turn to the analysis of §§ 205(a) and 207, particularly with regard to the effect of the Harsha Amendments. As we indicated earlier, it is important to keep in mind the distinct stages involved in the contract-grant mechanism. Appellant-Administrator argues, primarily from the Harsha Amendments, that the Act permits discretion at the *allotment* phase. Appellee-City counters that while the Administrator might control the timing

of future spending through delay of *obligation*, he must fully allot. We agree with Appellee because, after careful consideration of the relevant history, we find it clear that the Congressional intent, both before and after the Harsha Amendments, was to make allotment mandatory.

"Section 205(a), by its terms, supports the Appellee. It is mandatory in tone: 'Sums authorized to be appropriated pursuant to section 207 for each fiscal year . . . *shall be allotted* by the Administrator. . . .' (Emphasis added.)

"The Appellant argues that the Harsha Amendments, by adding 'not to exceed' in § 207, manifest an intent to make the *allotment* (under § 205) discretionary. However, the imposition of a ceiling on authorized appropriations is not inconsistent with the Appellees' position concerning mandatory allotment. Logically, it could be interpeted to mean that the amount obligated (later appropriated and expended) in any fiscal year *may* be less than the maximum amount authorized. We concede that the elimination of the word 'all' from § 205(a) is a source of confusion. At least one court[18] has chosen to rely entirely upon this syntactical change, although there is no precise explanation of its meaning. We consider it more useful to examine the statements of sponsors purporting to explain the intended effect of the Harsha Amendments; we find that allotment remained mandatory." *City of New York v. Train*, Combined Appendix pp. 19A-20A (emphasis by the court).

"[18]Campaign Clean Water v. Ruckelshaus, Civil No. 18-73-R (E.D. Va. filed June 5, 1973) slip op. at 14. [Court's footnote.]

III

The President Has Only Such Powers to Refuse to Spend Funds Authorized by Congress as May Be Found or Implied by Legislation

In the many congressional hearings on impoundment of funds by the President, Congressmen have referred to the refusal to allot funds under the FWPCA as an impoundment issue. As previously discussed (*supra* pp. 25-33), we see a very important distinction. Refusal to allot funds authorized to be appropriated has the effect of cutting off a federal financial commitment which Congress has made, while impoundment may simply delay the spending.

Discussions of impoundment nonetheless may be helpful in resolving this issue. Whatever might be said of the impropriety of impoundment should be amplified for the facts before this Court. If the President lacks authority to delay expenditure of funds appropriated by Congress, how much more surely must he lack the power to completely block use of funds.

Though Presidents have been impounding funds since Jefferson, the practice has never been so extensively employed as by President Nixon. Historically, the power to impound has been treated as a limited one. Traditionally, impoundments have fallen into one of three categories:

> "(1) [F]unds were impounded solely because they were no longer necessary for or appropriate to the achievement of the ends for which they had been made available; (2) the impoundment was arguably justifiable as an exercise of the President's authority as Commander in Chief of the Armed Forces, either because the funds with-

held had been made available for defense programs or because spending of the funds would hinder a war effort; or (3) Congress had authorized the President to impound if necessary as a means of reducing government spending." *Impoundment of Funds*, 86 Harv. L. Rev. 1505, 1508.

Although arguably impoundment at the obligation stage may fall into the third category, a reduction of allotment does not fall into any category and has no historical support. An excellent summary of the past use of the impoundment power may be found in the *Hearings on H.R. 5193 and Related Bills Before the Subcomm. on Rules*, 93rd Cong., 1st Sess., pts. 1, 2 at 88, *et seq.*, L.C. 73-602108 (1973).

The exercise of the power of impoundment by President Nixon has gone far beyond the practice accepted in the past. The result is a "constitutional crisis" which ultimately must be resolved in the courts. Congress' own short-term response, after much debate, has been to pass an anti-impoundment bill, HR 8480 (which requires the President to report all impoundments). The harm has already been done however to the FWPCA and can only be rectified by judicial decision.

In the Hearings on Impoundment,[7] Congressman Evans of Colorado expressed a sentiment which was shared by many of his colleagues:

> "The current situation is intolerable. The President impounds with impunity and we in Congress search for ways to force the President to carry

[7] *Hearings on H.R. 5193 and Related Bills Before the Subcomm. on Rules*, 93rd Cong., 1st Sess. (1973).

out his constitutional duties to execute the laws of the United States. . . .

"An appropriation bill, if passed and signed by the President, is a law. The Constitution states that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' (Art. I, sec. 1.) The Constitution further states that, 'No money shall be drawn from the Treasury, *but* in consequence of appropriations made by law.' (Art. I, sec. 9; emphasis added).

"Consequently, the starting point of any discussion is that the power to spend money—and surely, by any stretch of logic, the authority not to spend money—is vested originally in the Congress. Any delegation of that authority must come from the Congress itself. . . .

"Second, the powers of the President, while vast, are not inherently broad in themselves. Congress has delegated an enormous amount of authority to the President over the years. But the theory expressed so many times by the Nixon administration, that somehow the President has broad 'inherent' authority in many different areas, surely is wrong. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Supreme Court emphatically ruled that President Truman lacked the 'inherent' constitutional authority to seize the steel industry. . . .

"In other words, the President, as well as the Congress, must be guided by the fundamental constitutional principle that the Federal Government is a government of limited, enumerated powers.

"Now, of course, the Anti-Deficiency Act allows the President to impound funds under very specific circumstances, 'to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available.' (31 U.S.C. 665(c)(2).) However, these are carefully circumscribed circumstances which do not spell out a broad, inherent authority to impound. This is the opinion of the Comptroller General of the United States, the Honorable Elmer B. Staats, as stated in recent testimony before Senator Ervin's subcommittee. In addition, of course, when Justice Rehnquist was Assistant Attorney General in 1969, he wrote a memorandum to a White House official that the President lacked the inherent constitutional authority to impound. Now, the Nixon Administration states that Mr. Rehnquist was wrong. The question is up to the Supreme Court to decide, but surely it should not be the Congress, on its considered reaction, which concedes an iota of such authority." *Hearings on H.R. 5193 and Related Bills Before the Subcommittee on Rules, House of Representatives*, 93rd Cong., 1st Sess. (1973).

Congressmen have recognized that the question of impoundment is one properly to be decided by the Supreme Court. This case presents Your Honors with an opportunity to resolve an important issue.

We turn to the opinion by Justice Rehnquist mentioned by Congressman Evans. That opinion on

the question of the President's authority to impound funds was written as an opinion memorandum in 1969 by then Assistant Attorney General William Rehnquist. 116 Cong. Rec. S 158 (daily ed. Jan. 20, 1970). The legislation with which the opinion dealt appropriated funds for assistance to federally impacted schools, but the rationale would appear to be equally applicable to the FWPCA. The opinion emphasized the fact that the impoundment would result in:

". . . permanent loss to recipient school districts of the funds in question and defeat of the Congressional intent that the operations of these districts be funded at a particular level for the fiscal year." 116 Cong. Rec. S 159 (daily ed. Jan. 20, 1970).

A similar loss of funds will result if the reduction of allotments is not rejected under the FWPCA.

Some of the same arguments raised in support of President Nixon's actions were disposed of by William Rehnquist:

"It has been suggested that the President's duty to 'take care that the laws be faithfully executed' might justify his refusal to spend, in the interest of preserving the fiscal integrity of the Government or the stability of the economy. This argument carries weight in a situation in which the President is faced with conflicting statutory demands, as, for example, where to comply with a direction to spend might result in exceeding the debt limit or a limit imposed on total obligations or expenditures. See, *e.g.*, P.L. 91-47, title IV. But it appears to us that the conflict must be real and imminent for this argument to have validity; it would

not be enough that the President disagreed with spending priorities established by Congress. . . ." 116 Cong. Rec. S 160 (daily ed. Jan. 20, 1970).

In the case of reduction of allotments under FWPCA, President Nixon has let it be well known that he disagrees with Congress' spending priorities, but there are no conflicting statutory demands to justify his directive to the Administrator to impound funds prior to allotment.

An unpublished opinion letter of May 27, 1937, by Attorney General Cummings to the President is cited by the Rehnquist opinion. The Cummings opinion held that the President could not legally require the heads of departments and agencies to withhold expenditures from congressional appropriations.

William Rehnquist also cites the United States Supreme Court case of *Kendall v. United States*, 37 U.S. 524 (1838). That case dealt with an Act of Congress directing the Treasury to settle an account under a contract for mail service. When the Postmaster General refused to credit part of the funds, a writ of mandate was held proper to compel the expenditure. It is considered prominent among the cases rejecting the constitutionality of impoundment by the President without authorization from Congress.

Congressman Evans, in addition to referring to the Rehnquist opinion, mentioned the Anti-Deficiency Act as providing for Presidential impoundment of funds "under very specific circumstances."

In concluding that the Anti-Deficiency Act would not allow the Secretary of Transportation to withhold the authority to obligate apportioned funds under the

Federal-Aid Highway Act, the Eighth Circuit provided a good summary of the role of the Anti-Deficiency Act.

> "Although the applicability of the Anti-Deficiency Act, 34 Stat. 49, as amended, 64 Stat. 765, 31 U.S.C. § 665(c), was not argued on this appeal, the conclusion we reach is not at variance with the provisions of that Act. Section 665(c)(2) allows the Bureau of the Budget (now OMB), when apportioning appropriation funds, to set up reserves (i.e., withhold the funds) in order 'to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available.' However, the Act goes on to point out that the reserves may only be established when the funds '*will not be required to carry out the purposes of the appropriation concerned* . . . .' (Emphasis ours.) The legislative history is emphatic in noting that this power to withhold funds cannot be used if it would jeopardize the policy of the statute.
>
> " 'It is perfectly justifiable and proper for all possible economies to be effected and savings to be made, *but there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds.* If this principle of thwarting the will of Congress by the impounding of funds should be accepted as correct, then Congress would be totally incapable of carrying out its constitutional mandate of providing for the defense of the

> Nation.' (Emphasis ours.) H.R.Rep. No. 1797, 81st Cong., 2d Sess. 311 (1950).
>
> It is thus apparent that any withholding in order to 'effect savings' or due to 'subsequent events,' etc., must be considered in context of not violating the purposes and objectives of the particular appropriation statute. Such purposes and objectives are necessarily violated when one charged with implementing the statute acts beyond his delegated authority." *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1118 (8th Cir. 1973).

The Eighth Circuit's reading of the Anti-Deficiency Act is perfectly consistent with that found in *Impoundment of Funds*, 86 Harv. L. Rev. 1505, at 1528:

> "The Antideficiency Act of 1950 was passed partly in order to limit executive impoundments to those undertaken only to further the purposes of the particular program involved. . . ." (Footnotes omitted.)

Further support for this reading of the Anti-Deficiency Act is found in *Presidential Impounding of Funds: The Judicial Response*, 40 U. Chi. L. Rev. 328, 337-38:

> "The Anti-Deficiency Act cannot, therefore, be taken as granting a general power to impound. On the contrary, it limits the power to impound to the achievement of efficiency and economy in carrying out the spending programs Congress has authorized, without in any way impairing the achievement of the programs' goals. Indeed, the Supreme Court's decision in the Steel Seizure Case suggests that, since Congress has defined the purposes for which impounding is permissible, any impounding not authorized by the Act or by a specific appropriations statute is illegal." (Footnotes omitted.)

The requirements of the Anti-Deficiency Act should not be used as an excuse for allowing the President to circumvent the clear congressional policy found in the FWPCA.

IV

The Position of Respondents in This Case Is Supported by the Recent Decision in Missouri v. Volpe

Since the reduction of allotments under the FWPCA, a significant decision concerning the legality of impoundment has been decided by the Eighth Circuit Court of Appeals. On April 2, 1973 in *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), Judges Lay and Heaney concluded that the Federal-Aid Highway Act does not expressly or implicitly authorize the Secretary of Transportation to withhold the authority to obligate apportioned funds because of the status of the economy and the need to control inflation.

The funding procedures under the FWPCA are largely patterned after the Federal-Aid Highway Act, except that greater flexibility in the obligation phase was built into the FWPCA by use of the "not to exceed" language in section 205(a). Although the action challenged in *Missouri v. Volpe* was at the obligating

stage rather than the allotment stage,[8] the opinion has substantial value here as a rejection of the proposition that the President has inherent power to reduce expenditure of funds authorized by Congress.

One argument presented by the government was that the states had no vested rights in the funds until the Secretary approved a specific project. To that the court replied that, assuming, *arguendo*, there was no vested right until approval, that does not mean the Secretary has discretion to withhold approval for reasons not contemplated in the Act.

Another argument made by the government which the court found unavailing was the contention that appropriation Acts are permissive in nature and do not provide specific mandate that funds authorized to be appropriated must be expended. The court responded:

> ". . . For although a general appropriation act may be viewed as not providing a specific mandate to expend *all* of the funds appropriated, this does not *a fortiori* endow the Secretary with the authority to use unfettered discretion as to when and how the monies may be used. The Act circumscribes that discretion and only an analysis of of the statute itself can dictate the latitude of the questioned discretion. Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 322 . . .

[8]As for the reduced allotments, former Federal Highway Administrator, F. C. Turner, had observed: "There is absolutely no discretion of any kind in our office with respect to how much any State gets in any of these categories of funds [pursuant to the formula]. The apportionment is specified in the law and we distribute it right to the dollar." Testimony reported in *Hearings on Executive Impoundment of Appropriated Funds Before the Subcommittee on Separation of Powers of the Committee on the Judiciary*, 92nd Cong., 1st Sess. at 80 (1971).

> (1961); Federal Trade Commission v. National Lead Co., 352 U.S. 419, 428 . . . (1957); Stark v. Wickard, 321 U.S. 288, 309 . . . (1944); Pentheny, Ltd. v. Government of the Virgin Islands, 360 F.2d 786, 790 (3 Cir. 1966)." *State Highway Commission of Missouri v. Volpe, supra*, 479 F.2d at 1109 (emphasis by the court).

V

Even Assuming Sections 205(a) and 207 Gave the Administrator Discretion to Limit Allotments, He Abused That Discretion by Allotting Only $5 Billion of the $11 Billion Authorized for Appropriation for 1972 and 1973

It is our contention that there is no discretion delegated as to the allotment stage though there is flexibility as to the rate of spending. The United States District Court, Eastern District of Virginia concluded that the Administrator has discretion to reduce allotments (as conceded by plaintiffs in that case) under sections 205 (a) and 207 *but* that the allotment of only $5 billion constitutes a flagrant abuse of that discretion and violates the Act. *Campaign Clean Water v. Ruckelshaus.* (Joint Appendix F.) When the matter was appealed, the Fourth Circuit concurred with the District Court that whatever discretion the executive might have was limited and the exercise of that discretion was reviewable, but concluded the reduction of allotment did not, on its face and without any other evidentiary support, require a finding of executive nullification of the purposes of the Act. In arriving at its decision to remand with directions to consider evidence on whether the reduction was violative of the spirit, intent, and letter of the Act, the Fourth Circuit con-

sidered a number of factors. One of the factors was the Administrator's contention before the Senate ad hoc Subcommittee on Impoundment of Funds on February 6, 1973, that the allotments were arrived at on the basis of an administrative judgment that greater authorizations could not be spent in a wise or expeditious way. Not only does this decision conflict with the congressional judgment as to how much money was needed to accomplish the goals of the Act, but such a statement completely overlooks the mechanism for carrying over allotted but unused funds. This latter consideration is equally applicable to the argument accepted by the court that no qualified project in Virginia had been denied contract authorization. It is impossible to foresee what contracts might be supported in the future by allotments which are carried over. We hasten to add that if the United States Supreme Court evaluates the question whether there was an abuse of discretion, the fate of more states than Virginia is involved. As the Fourth Circuit itself noted, other states have proven projects have qualified for grants but have been denied construction approval because of the paucity of funds allotted, *cf. State of Minnesota v. EPA, supra.*

Finally, the Fourth Circuit emphasized that the Administrator claims the power to increase allotments during a fiscal year and has indicated he would give consideration to doing so if the 1973 and 1974 allotments were inadequate. Though in the abstract the Administrator may have such a power, realistically it is the President who has ordered reduction of allotments, so the Administrator's state of mind is of little consequence. Furthermore, an increase in allotments was never made

in 1973, so unless this Court rules in favor of requiring full allotments, that money is forever lost.

Although we contend that the allotments are mandatory rather than discretionary, if this Court should hold them discretionary, we believe that the Administrator's allotment of only 55% of the funds is *per se* an abuse of discretion.

Both courts in the decisions before Your Honors examined the legislative history of the provisions for grants for waste treatment plants and found a strong congressional financial commitment to construction of waste treatment plants. That commitment would be contravened and the purpose of the legislation frustrated by a reduction of 45% of the allotment funds. The President should not be allowed to do by extraconstitutional means what he failed to accomplish when he vetoed the FWPCA and was overruled by Congress. If this Court should conclude that the allotments are not mandatory under sections 205(a) and 207, the action of the Administrator should still be held null and void as an abuse of discretion.

VI

The Doctrine of Separation of Powers Prohibits the Type of Executive Assumption of Congressional Function Accomplished by Refusal to Comply With the Allotment Procedures of the FWPCA

Rarely during this country's history has the concern over assumption of congressional power by the President been as great as it is today. Many Congressmen feel that the doctrine of separation of powers will not remain viable unless the impoundment powers of the President are checked. Twenty-nine Congressmen sub-

mitted an "amicus curiae brief" opposing the Secretary of Transportation's policy of reducing expenditures in the case of *Missouri v. Volpe*.[9] That brief stated that the Administrator's impoundment practices are "contemptuous of the role of Congress in our tripartite system." Congressional Quarterly Weekly Report, Vol. 31, No. 14, p. 788 (April 7, 1973).

All legislative powers were bestowed by our Constitution (art. I, § 1) upon the Congress of the United States. Article I, section 9 of the Constitution delegates all authority for appropriations to the Congress. Executive power is vested in the President by article II, section 1.

Although the Constitution does not expressly prohibit one branch from exercising the powers of another,

[9]Senator Samuel J. Ervin, Jr., Chairman, Government Operations Committee; Senator James O. Eastland, President Pro Tempore, Chairman, Judiciary Committee; Senator Michael J. Mansfield, Majority Leader; Senator Robert C. Byrd, Assistant Majority Leader; Senator Jennings Randolph, Chairman, Public Works Committee; Senator John L. McClellan, Chairman, Appropriations Committee; Senator Howard W. Cannon, Chairman, Aeronautical & Space Sciences Committee; Senator Thomas F. Eagleton, Chairman, District of Columbia Committee; Senator J. W. Fulbright, Chairman, Foreign Relations Committee; Senator Vance Hartke, Chairman, Veterans' Affairs Committee; Senator Henry M. Jackson, Chairman, Interior & Insular Affairs Committee; Senator Gale W. McGee, Chairman, Post Office & Civil Service Committee; Senator Warren G. Magnuson, Chairman, Commerce Committee; Senator Lee Metcalf, Chairman, Joint Committee on Congressional Organization; Senator John Sparkman, Chairman, Banking, Housing & Urban Affairs Committee; Senator Stuart Symington; Senator Harrison A. Williams, Jr., Chairman, Labor & Public Welfare Committee; Representative Morris K. Udall; Senator John A. Stennis, Chairman, Armed Services Committee; Senator Herman E. Talmadge, Chairman, Agriculture & Forestry Committee; Senator Frank E. Moss, Chairman, Aeronautical & Space Sciences Committee; Senator Hubert H. Humphrey; Senator John V. Tunney; Representative William V. Alexander, Jr.; Representative Robert F. Drinan; Representative J. J. Pickle; Representative Benjamin Rosenthal.

it has been said that the doctrine of separation of powers is fundamental to our form of government. *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582 (1949). The United States Supreme Court has repeatedly referred to the doctrine as one of the chief merits of our system of a written constitution. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *O'Donoghue v. United States*, 289 U.S. 516 (1933); *Kilbourn v. Thompson*, 103 U.S. 168 (1880). Although there is bound to be a certain area of concurrent jurisdiction, the continued integrity of our system may depend upon the mutual independence of the Legislature, the Executive and the Judiciary. *McCray v. United States*, 195 U.S. 27 (1903).

It is true that the President has the duty to "take care that the laws be faithfully executed." However, as the Fourth Circuit Court of Appeals stated in *Campaign Clean Water:*

> "The power to spend rests primarily with Congress under the Constitution; the executive, on the other hand, has the constitutional duty to execute the law in accordance with the legislative purpose so expressed. When the executive exercises its responsibility under appropriation legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review. . . ." Appendix pp. 45A, 46A, 47A (footnotes omitted).

Should this Court conclude that the FWPCA did not specifically require all funds to be allotted, we would urge Your Honors to recognize the validity of the position summarized in *Presidential Impounding of Funds: The Judicial Response, supra,* pp. 355-56, where it is stated:

> "There is no basis for a general impounding power, by express terms or by implication, either in the Constitution or in any general statute. Authorization and appropriations statutes only rarely allow the president entirely to terminate a program by impounding. The president may end a program only be [*sic*] vetoing it in accordance with the Constitution. He has no authority to use impounding as an absolute, retroactive, or item veto. Congress should be presumed to have passed each appropriation statute with the intent that the monies be spent; in the absence of explicit statutory language to the contrary, the president should be deemed bound by his oath of office to carry out Congress's purpose. In most cases, the courts have power to grant persons who have been injured by unlawful impounding a legal remedy. This power should be exercised to insure that persons receive benefits that Congress intended them to have, to preserve the constitutional separation of powers, and to forestall a serious constitutional crisis." (Footnote omitted.)

As early as 1838 the Supreme Court indicated that the duty to execute the laws does not include the right to denegrate the law. *Kendall v. United States,* 37 U.S. 524 (1838). Application of the reasoning of the *Kendall* case recently resulted in a District Court's enjoining the Office of Economic Opportunity from terminating the funding for a program. Relying on *Kendall,* the court rejected the argument that the President has discretionary power to refuse to spend certain funds. *Local 2677, American Fed. of Gov. Emp. v. Phillips,* 358 F. Supp. 60 (D. D.C. 1973).

President Nixon did not agree with the policy decision made by Congress when it authorized $18 billion for appropriation for waste treatment plants. He accordingly exercised his constitutional prerogative to veto the legislation, and Congress in turn exercised its constitutional right, granted in article I, section 7, to override that veto. The legislative, not the executive, branch thus may have the final say as to what becomes law. To now allow the President to accomplish by reducing allotments what he could not by veto should be tantamount to giving the President an item veto and would violate the doctrine of separation of powers.

Conclusion

The issue before this Court is clear. Having failed to reverse the policy decision of Congress by exercise of his constitutional power of veto, will the President now succeed by extra-constitutional measures to frustrate the intent of Congress and lessen the national commitment to clean our waters?

We contend that the legislative history of the FWPCA, and of sections 205(a) and 207 in particular, makes clear the congressional commitment to spend the $18 billion deemed necessary as the federal share for construction of waste treatment plants. Allotment by the Administrator of funds authorized to be appropriated is a ministerial act, though some flexibility

in spending is built into the Act. Mandamus is a proper remedy to protect the interests of the states which must build waste treatment plants to comply with the requirements of the Act.

This Court should not abdicate its responsibility to act to maintain the constitutional doctrine of separation of powers. This Court should affirm the judgment of the Court of Appeals for the District of Columbia and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this.....day of July, A.D. 1974.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

CONSOLIDATED CASES: No. 73-1377 and No. 73-1378

RUSSELL TRAIN, Administrator of the Environmental Protection Agency,

Defendant-Appellant,

vs.

CITY OF NEW YORK, et al.,

Plaintiffs-Appellees.

BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE CITY OF NEW YORK AND OF CAMPAIGN CLEAN WATER INC.

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STATEMENT OF THE QUESTION INVOLVED

WHETHER THE EXECUTIVE BRANCH OF GOVERNMENT MAY REFUSE TO SPEND $11 BILLION FOR WATER TREATMENT FACILITIES DESPITE A CONGRESSIONAL MANDATE TO SPEND THIS AMOUNT, DESPITE LEGAL AUTHORITY REQUIRING EXPENDITURE OF THIS AMOUNT, AND DESPITE COMPELLING PUBLIC POLICY ARGUMENTS TO SPEND THIS AMOUNT?

The People of the State of Michigan say "No."

INTEREST OF THE AMICUS

The People of the State of Michigan comprise more than 8,875,000 residents as of the 1970 census. The area of the State of Michigan includes more than 96,720 square miles.

The People of the State of Michigan are vitally concerned furthermore, with matters of environmental quality affecting their air, land, and water, and in this regard have enacted comprehensive legislation.

Because of this commitment to a better environment, the People of the State of Michigan believe that they will need to spend approximately $1.8 billion in the 1970's to build water treatment facilities. Under the Federal Water Pollution Control Act Amendments, Congress mandated $980 million for water treatment facilities to the State of Michigan. On November 28, 1972, the Administrator of the Federal Environmental Protection Agency announced that Michigan will only receive $481 million.

This cutback in federal funds means:

> Possible five to ten year delays in water treatment construction programs in Michigan.
>
> Possible delays in eliminating phosphorous discharges which are blamed for deterioration of the Great Lakes.
>
> Untenable delays for small communities who need funding to build long-delayed water treatment facilities.
>
> Severe setbacks for metropolitan areas seeking to improve their water treatment facilities.

In short, the impounding of federal funds severely impairs the ability of Michigan to abate water pollution.

The People of the State of Michigan view the outcome of this litigation, therefore, with profound concern. We are convinced that a ruling of this Court permitting the executive branch of the federal government to impound funds mandated by Congress for water pollution control would have a deleterious effect on the citizens of Michigan and on the water resources of Michigan.

The State of Michigan, consequently, respectfully files this brief as amicus curiae pursuant to Rule 42 of the rules of this Court.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

CONSOLIDATED CASES: No. 73-1377 and No. 73-1378

RUSSELL TRAIN, Administrator of the Environmental Protection Agency,

Defendant-Appellant,

vs.

CITY OF NEW YORK, et al.,

Plaintiffs-Appellees.

BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE CITY OF NEW YORK AND OF CAMPAIGN CLEAN WATER INC.

STATEMENT OF THE CASE

The Federal Water Pollution Control Act Amendments of 1972, Pub L No 92-500, 86 Stat 816, were enacted into law when both houses of Congress overrode a presidential vote. The Senate vote was 52-12; the House vote was 247-33.[1]

One month later, the President instructed the administrators of the Environmental Protection Agency to withhold from the States more than half of the allotment of funds for wastewater treatment facilities enumerated in the amendments to the Act. Instead of following the statutory ceilings of $5 billion for 1973 and $6 billion for fiscal 1974, the President established the

[1] 118 Con Rec H 10, 226-73 (daily ed Oct 18, 1972); 118 Con Rec S 18, 546-54 (daily ed Oct 17, 1972).

allotments for those years at $2 billion and $3 billion respectfully.[2]

The impoundment of these funds by the executive is the basic issue of this litigation.

The brief of the State of Michigan in opposition to executive impoundment of water control funds now follows.

[2] Letter to William Ruckelshaus, EPA Administrator, from President Richard Nixon, Nov 22, 1972, in Hearings on Federal Budget for 1974 before the House Committee on Appropriations, 93rd Cong, 1st Sess, 194-95 (1973).

INTRODUCTION

"The frog does not
Drink up
The pond in which
He lives."

—American Indian Proverb.

The possibilities of losing our water supply by depletion or pollution evoke fears almost as old as western civilization. To destroy sweet water is to threaten life. The effects of such a loss are so awesome that the power to accomplish it was ascribed early in our experience only to the deity who apportioned the power among a select few. So Moses threatened Pharoah:

> "Behold, I will smite with the rod that is in my hand upon the waters which are in the river, and they shall be turned. And the fish that are in the river shall die, and the river shall become foul . . ."
>
> [Exodus 7:17-18.]

But, 4000 years later, the "select few" have multiplied several million-fold, and today foul rivers and dead fish are commonplace. To appreciate the magnitude of the problem, it is necessary to understand the extent of our need for water.

In 1963, experts estimated that the maximum amount of fresh water available for all uses in the United States was approximately 650 billion gallons per day.[3] It was estimated that the total fresh water usage eight years ago was 360 billion

[3] Report of the Staff of the Senate Committee on Public Works, 88th Cong., 1st Sess., A Study of Pollution — Water 3 (Comm. Print 1963), cited in Hines, "Nor Any Drop to Drink: Public Regulation of Water Quality Part I: State Pollution Control Programs," 52 Iowa L Rev 186 at 187, fn. 2.

gallons per day.[4] The projection for the year 2000 was 1000 billion gallons per day.[5] Since this is 350 billion gallons more than we have available, if the experts are within a 30% margin of error, we can better understand Pharoah's predicament.

Two feasible solutions have been suggested. One is to refine the process for making sea water potable,[6] and the other is to re-use our present water several times; to re-cycle water as we do aluminum, glass, and paper.[7] But in any case, it is necessary to safeguard the quality of even that water we intend to re-use. As Professor Hines observed in Part I of his Iowa Law Review trilogy on this general problem, 52 Iowa L Rev at p 188:

> "Re-use of water requires that certain water quality levels be maintained, however, and here is where water pollution is a critical obstacle to the assurance of adequate water supplies for the forseeable future. * * *"

Two conclusions are reached from Professor Hines' trilogy and from a review of commentators he cites.[8] First, the water crisis will worsen, not abate, without strenuous efforts

[4] Hines, p 188, fn. 3.

[5] Id.

[6] Carr, *Death of the Sweet Waters*, 211-213 (1966).

[7] See, Bryan, "Water Supply and Pollution Control Aspects of Urbanization," 30 Law & Contemp. Prob. 174 (1965).

[8] F. Graham, *Disaster by Default: Politics and Water Pollution* (1966); Wright, *The Coming Water Famine* (1966); Rodale, *Our Poisoned Earth and Sky* (1964); Carson, *The Silent Spring* (1962); Stein, "Problems and Progress in Water Pollution," 2 Natural Resources J 388 (1962).

to conserve our present supply. Second, even with such strenuous efforts, developments in processes for re-cycling and for desalinization are necessary if we are to survive as a civilization.

Michigan, furthermore, has a deep concern with this crisis over pollution of our water resources. Michigan abounds with water resources. For instance, the State of Michigan has 3,177 miles of shoreline, more than any other state in the nation, except Alaska. Additionally, Michigan covers 38,575 square miles of the Great Lakes. Within the state, there are 11,037 inland lakes. The length of the courses of major rivers in Michigan is 5,499 miles; in addition, there are an estimated 30,000 miles of tributaries.[9] Therefore, Michigan acutely feels the pain of the loss of federal water pollution control funds.

With the concern of its vast and valuable resource at stake, the People of the State of Michigan, amicus curiae herein, vigorously challenge the authority of the executive to reduce the allotment of funds authorized by Congress for water polluton control.

Indeed, the People of the State of Michigan hear and respond now to the ominous threat which Moses once made to the Pharoah.

[9] See, *Encyclopedia Americana*, Vol XIX, p 18 (1960) and *Michigan Manual*, 1971-72, p 1.

ARGUMENT

I.

EXECUTIVE IMPOUNDMENT OF WATER POLLUTION CONTROL FUNDS DESPITE A MANDATORY CONGRESSIONAL APPROPRIATION IS WITHOUT STATUTORY OR CONSTITUTIONAL AUTHORITY.

A. CONGRESS HAS MANDATED THAT $11 BILLION FOR THE FISCAL YEARS 1973 AND 1974 BE APPROPRIATED FOR THE CONSTRUCTION OF WASTE WATER TREATMENT FACILITIES TO ABATE WATER POLLUTION.

> "The whole effort [of pollution abatement] is lagging now for a number of reasons, one of which is that the Federal government hasn't put money on the line."
>
> — Stewart Udall, 1969 quoted in *Water Wasteland*, by David Zwick and Marcy Benstock, (Bantam Books, 1972), p 305.

Enthusiasm for water pollution abatement is often tempered by the notion that large expenditures of public funds are necessary to restore ecological sanity. Thus, the history of water pollution abatement is one where financial commitments have failed to match up with rhetorical pledges.

For instance, even though President Lyndon B. Johnson boldly announced in 1966 that "the promise is clean rivers, tall forests, and clean air — a sane environment for man,"[10]

[10] US Congress, House of Representatives, Congressional Record, Feb. 23, 1966, p 3667.

and even though President Richard M. Nixon declared in 1970 that "the 1970's absolutely must be the years when America pays its debt to the past by reclaiming the purity of its air, its waters and our living environment,"[11] the hard facts tell a different story with respect to water pollution control.

In fact, the executive branch has a long history of spending no more than it absolutely has to for water treatment facilities. The following chart outlining the large backlog of unapproved grant applications for four states and one territory as of June 30, 1970, suggests the real problem:

Applications pending June 30, 1970 at state agencies and FWQA regional offices	*Fiscal 1970 allocation*	*Estimate of backlog (applications pending minus fiscal 1970 allocation)*
(all figures in millions of dollars)		
New York	$592.3	$69.9	$522.4
Michigan	114.9	33.0	81.9
District of Columbia	49.9	3.8	46.1
Indiana	59.5	20.0	39.5
Maryland	52.1	13.6	38.5

[It is important to remember that these figures do not measure the total extent of need, since it has been found that many cities do not bother to apply for grants when funding levels are low.][12]

[11] Quoted in *Congressional Record*, Volume 116, page 16,096, Sept. 21, 1970 (daily edition).

[12] Zwick and Benstock, *Water Wasteland*, (Bantam Books, 1972) p 315. Viewing the entire problem from a different perspective, the executive only spent $262 million of the $800 million appropriated in 1970 for water pollution control and $475 million of the $1 billion appropriation in 1971. See, Green, Fallows and Zwick, *Who Runs Congress?* (Bantam/Grossman Book, 1972) pp 114-115.

In short, the history is evident — pledges are conveniently ignored when the practical work of disbursing money for water pollution treatment is actually undertaken.

Faced with this history, Congress passed a water pollution measure on October 4, 1972 entitled the Federal Water Pollution Control Act Amendments of 1972, 15 USCA 1251 et seq, which authorized appropriations in the amount of $11 billion for the fiscal years 1973 and 1974 to be used for water waste treatment construction grants. Although the bill was vetoed by the President, the veto was promptly overturned by Congress.

Turning to the Federal Water Pollution Control Act Amendments of 1972, two specific sections stand out in their importance to this litigation. Section 207, reads as follows:

> "There is authorized to be appropriated to carry out this title, other than section 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000 . . . ."

Additionally, Section 205 provides:

> "(a) Sums authorized to be appropriated pursuant to Section 207 for each fiscal year beginning after June 30, 1973, *shall be* allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for the fiscal 1973 *shall be* made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums *shall be* allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States . . . ." [emphasis ours.]

We firmly support the view that the language of the Water Pollution Control Act Amendments of 1972 imposes a mandatory duty on the executive branch of government to allot exactly the sums stated in the Act. There is no discretion in the allotment stage; the use of the word "shall" is mandatory language.

The plain language of the Federal Water Pollution Control Act should, indeed, govern this litigation. Two extremely eminent members of the Supreme Court have commented upon the controlling nature of the language of a statute as follows:

> "We do not inquire what the legislature meant; we only ask what the statute means."
>
> [Mr. Justice Oliver Wendell Holmes, Collected Legal Papers, 207.]

and

> "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when the legislative history is doubtful do you go to the statute."
>
> [Mr. Justice Felix Frankfurter, quoted in 47 Col L Rev 527, 543 (1947).]

We submit the language of the Federal Water Pollution Control Act Amendments of 1972 is without equivocation, the Administrator of the Environmental Protection Agency must allot the $11 billion authorized for water treatment facilities.

B. THERE IS A GROWING LIST OF LEGAL PRECEDENTS DECLARING EXECUTIVE IMPOUNDMENT OF A MANDATORY CONGRESSIONAL APPROPRIATION TO BE UNLAWFUL.

> "With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that the existence of such a broad power is supported by neither reason nor precedent."
>
> — Memorandum from then Assistant Attorney General William H. Rehnquist to Edward L. Morgan, Deputy Counsel to the President, December 1, 1969 at 8. Quoted in 22 Stan L Rev 1240, 1250 (1970).

The announcement by the President that federal water pollution control funds would be impounded triggered a series of law suits by citizens, municipalities and states. The culmination of this extensive litigation is the consideration of the issue by this Court. Although various lower federal court decisions have split on the issue of executive impoundment, we submit that the better view as enunciated in lower federal court decisions sets out a compelling legal argument against executive impoundment of water pollution control funds.

The principal argument in opposition to executive impoundment rests on a careful reading of the statute and the legislative history which in turn spells out the notion that the allotment of $11 billion in water pollution control funds is a mandatory duty imposed on the Administrator of the federal Environmental Protection Agency. For instance, in *Martin-Trigona v Ruckelshaus*, (No 72C 3044, DC ND Ill, July 9, 1973) [5 ERC 1665, 1669], the Court announced this view in clear terms: ". . . the Act provides for mandatory allotment of all funds." The US Court of Appeals for the

District of Columbia reached the same conclusion when it said in *New York City v Train*, (CA DC No 73-1705, January 23, 1974) [6 ERC 1177, 1188]:

> "Our reading of the relevant statutory language and careful analysis of the pertinent legislative history compels us to hold that Section 205(a) of the Act requires the Administrator to allot the full sums authorized to be appropriated in Section 207 . . ."

We submit, therefore, that the better view requires allotment by the executive of the full sums for water pollution control — $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974.

The rationale for the mandatory view of the allotment of water pollution control is further explained in *Texas v Fri*, (DC WD Tex, No A-73-CA-38, October 2, 1973) [5 ERC 2021, 2023], when the Court found that:

> "Evaluation of the Act as a whole and its legislative history evinces an unmistakable congressional intent to marshall the requisite federal funds to achieve the water quality goals set forth in the Act."

This spirit and intent of the Federal Water Pollution Control Act has further resulted in several courts declaring the executive impoundment to be an abuse of discretion. For instance, in *Campaign Clear Water v Ruckelshaus*, (DC ED Va, No 18-73-R, June 5, 1973) [5 ERC 1441, 1447], the Court declared that it:

> ". . . is well-satisfied that the challenged impoundment policy, by which 55% of the allocated funds will be withheld, is a violation of the spirit, intent and letter of the Act, and a flagrant abuse of executive discretion."

In *Minnesota v EPA*, (DC 4th Div Minn, No 4-73 Civ 133, June 25, 1973) [5 ERC 1587, 1592], the Court similarly responded to the government's argument that impoundment was based on matters of the national economy as follows:

> "Nothing in the Act gives the Administrator the authority to consider matters outside the corners of the Act itself. In failing to allot all of the money authorized in this matter, the Administrator is acting in express violation of the Act itself as well as in violation of the purposes of the Act as set forth by Congress."

Finally, we offer a line of decisions of this Court which negate the proposition of executive impoundment: *Kent v Dulles*, 357 US 116 (1958); *Cole v Young*, 351 US 536 (1956); *Peters v Hobby*, 349 US 331 (1955); and *Youngstown Sheet and Tube Co v Sawyer*, 343 US 579 (1952).

We submit, therefore, that as a matter of legal precedent, both recent and past, executive impoundment of a mandatory Congressional Appropriation should be rejected.

C. EXECUTIVE IMPOUNDMENT OF WATER POLLUTION FUNDS DESPITE A MANDATORY CONGRESSIONAL APPROPRIATION IS WITHOUT CONSTITUTIONAL AUTHORITY.

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . ."
>
> — US Const, Art I, Sec. 9.

Under the federal Constitution, exclusive authority over federal spending is vested in Congress. See, US Const, Art I, Sec. 9. It is Congress that has a final say over what becomes law and a veto, not impoundment, is the only way the President can express his displeasure with an appropriation measure. This argument is buttressed by Article I, Section 7 of the US Constitution which gives Congress the right to override presidential vetoes of legislation.

The President has no power to veto legislation absolutely. No item veto is granted to the President under the Constitution. Indeed, if the executive branch of government is permitted, at will, to refuse to spend funds after a statute has been enacted into law, then the executive branch will exercise an absolute authority which is not authorized by the Constitution and which directly contravenes the right of Congress to override a presidential veto under the Constitution.

The above analysis is quite significant in the instant situation since the President initially vetoed the appropriation for water pollution control. Congress, however, by two thirds vote overturned the President's veto. Yet, the executive now seeks to ignore and circumvent the Congressional mandate that it is in the interests of public policy to spend $11 billion for water pollution abatement by a program of executive impoundment.

We submit, furthermore, that Congressional control over the purse is not merely a negative power to establish a limit on spending but rather is a full and positive authority to compel the expenditures of funds. By freezing vast sums of appropriated funds, the executive challenges without authority the most basic and sacred right the Constitution has vested with Congress — the power of the purse.

D. THE EXECUTIVE SHOULD FAITHFULLY EXECUTE THE LAWS OF OUR COUNTRY.

> "[The President] shall take Care that the Laws be faithfully executed . . ."
>
> — US Constitution, Art II, Section 3.

The executive branch has no choice but to abide appropriations statutes. Before he may enter service of his office, the President must take the following Oath: "I do solemnly swear that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." US Const, Art II, Sec. 1. Included among the duties of the President is the duty to faithfully execute the laws of the land. US Const, Art II, Sec. 3.

Indeed, our history is predicated on the fact that we are a nation of laws. This is not to say that the executive branch is without authority or discretion. The executive has discretion, but that discretion must be exercised within the four corners of the Federal Water Pollution Control Act Amendments of 1972 which provides for a mandatory allotment of $11 billion in water pollution control funds.

Placing all of the arguments and authorities acknowledged in this litigation in perspective, we submit that the faithful execution of the laws of our country should receive the highest of priorities.

II.

THE INTEGRITY OF CONGRESS AND OF OUR SYSTEM OF GOVERNMENT STANDS IN JEOPARDY AS A RESULT OF EXECUTIVE IMPOUNDMENT OF FEDERAL WATER POLLUTION FUNDS.

A. THE EXECUTIVE SHOULD NOT BE ALLOWED THE PRIVILEGE OF IGNORING A MANDATED APPROPRIATION OF CONGRESS FOR THE PROTECTION OF THE PUBLIC HEALTH AND WELFARE.

> "There is a natural inclination in mankind to Kingly Government."
>
> — Warning of Benjamin Franklin in 1787 to the delegates to the Constitutional Convention, 1 M. Farrand, *Records of the Federal Convention of 1787*, at 83 (1966).

At stake in this litigation is whether the government will institute adequate financing for measures to restore the purity of our nation's waters. The executive branch has seriously limited the federal government's commitment in this area by impounding $5 billion of an $11 billion appropriation by Congress for water pollution treatment facilities. As Governor William G. Milliken of the State of Michigan has commented on this executive impoundment:

> "This action represents a serious blow to our efforts aimed at achieving clean-water goals in Michigan and throughout the Great Lakes region in this decade." [*The Detroit News*, November 30, 1972, p 1-c.]

The Governor's comments can certainly be applied to all

concerned state and local officials who hope to take effective steps towards abating pollution of our nation's waters.

Certainly, the executive is entitled to its opinion that certain expenditures will unacceptably inflate the economy. But, Congress is constitutionally entitled and in many fields is able, to make its own judgment on such matters, to decide national priorities by its own wisdom and to legislate accordingly. And so, in the case of waste water treatment plants, Congress has directed the authorized amount of $11 billion to be fully allocated among the states. In short, Congress has decided what the national priorities should be and the executive must accept this decision.

To allow the executive to ignore the judgment of Congress would be to completely negate the Congressional veto power and to completely ignore the desirability of abating water pollution. We submit that Congress adopted legislation towards building an environment other than depicted by T. S. Eliot in "The Waste Land" where "the dry stone [knows] no sound of water."

B. EXECUTIVE IMPOUNDMENT ERODES THE FOUNDATION OF REPRESENTATIVE GOVERNMENT.

> "The growing practice of impoundment, whereby the executive branch fails to expend funds according to the intent of Congress, looms as yet another force eroding the foundation of representative government."
>
> — United States Senator Frank Church of Idaho, 22 Stan L Rev 1240, 1241 (1970).

Once it is widely recognized that a program affecting the public health and welfare which is enacted into law by

Congress can be effectively obstructed and buried by the executive branch, the American people will sense the futility of working with their elected representatives. Yet, a crucial element of our democratic form of government is the right afforded to diverse political interests to appeal in a meaningful way to members of Congress.

Our government is based on three separate, but co-equal branches of government. The executive branch is not the only important forum for policymaking. Each branch of government, additionally, operates as a check and a balance on the other branches. The executive branch does not operate as the sole or the final check on matters of public concern.

The ability of Congress to act with authority on appropriations reflects on the operation of our three branches of government. The struggle is monumental but the solution must be directed to maintaining public confidence and reliance on our representative bodies and on our system of separation of powers.

CONCLUSION

"The founding fathers, in establishing our national government, reflected clearly the lessons they had absorbed concerning the history of man's struggle to be free from tyranny. They knew that those entrusted with governmental powers are susceptible to the disease of tyrants — to what George Washington described in his Farewell Address as the 'love of power and proneness to abuse it.' They realized that the powers of public officers should be defined by laws which they, as well as the people, are obliged to obey, and that liberty demands control by constant and uniformly enforced laws rather than by the arbitrary and inconstant whims of willful men."

— United States Senator Sam J. Ervin Jr., from North Carolina, 35 Law and Contemporary Problems 108, 121 (1970).

The PEOPLE OF THE STATE OF MICHIGAN believe that our country should strive towards restoring the purity of our waters, that our government is a government of laws, that executive impoundment represents a threat to representative government and that executive impoundment is without statutory, case or constitutional authority.

In light of these concerns, the PEOPLE OF THE STATE OF MICHIGAN URGE THIS COURT TO OVERTURN THE EXECUTIVE IMPOUNDMENT OF WATER POLLUTION CONTROL FUNDS.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF MINNESOTA

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BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF MINNESOTA

QUESTIONS PRESENTED

1. May the Administrator of the U.S. Environmental Protection Agency ignore Congressional intent and the mandatory requirements of the Federal Water Pollution Control Act Amendments of 1972 by refusing to allot to the States the full sums authorized by Congress to be appropriated for the construction of publicly owned sewage treatment works?

2. If the Administrator had any discretion in controlling the rate of spending for construction of publicly owned sewage treatment works was it erroneously exercised in that (a) it was exercised at the allotment stage rather than obligation stage; (b) the decision was based upon evaluation of competing national policies, priorities, goals, and objectives other than those established by Congress; (c) the amount withheld effectively frustrated achievement of the goals and purposes of the Act, and (d) in impounding the funds the Administrator sought to do indirectly what Congress directly forbade him to do by overriding the Presidential veto of the Act?

3. Is the allotment of funds within the narrow exception of being so "committed to agency discretion" that it is beyond judicial review even though the Act provides adequate standards by which the discretion may be evaluated to determine whether it was erroneously exercised?

STATEMENT OF THE CASE

The cases before the Court present issues of statutory construction to determine the existence of discretion, or the extent of any such discretion, granted to the Administrator of the United States Environmental Protection Agency (hereinafter the Administrator) in allotting funds among the States pursuant to the Federal Water Pollution Control Act Amendments of 1972 (hereinafter the Act).[1]

The pervasive objective of the Act as stated in Section 101(a) "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Congress declared in Section 101(a)(4) of the Act that "it is the national policy that Federal financial assistance be provided to construct publicly owned treatment works; . . . ." This policy is a vital part of the Act and is essential to achieve its objective. Congress authorized to be appropriated amounts not to exceed $5 billion for fiscal 1973, $6 billion for fiscal 1974 and $7 billion for fiscal 1975 to carry out this policy. Section 207.

The President vetoed the Act on October 17, 1972. The President in his message to Congress stated:

> Even if this bill is rammed into law over the better judgment of the Executive—even if the Congress defaults its obligation to the taxpayers—I shall not default mine. Certain provisions of S. 2770 confer a measure of spending discretion and flexibility upon the President, and if forced to administer this legis-

[1] Pub. L. 92-500 (Oct. 18, 1972), 86 Stat. 816, 33 U.S.C. 1251, et seq. The Act is commonly referred to by section rather than by its Code Citation. Therefore all references to the Act hereinafter will be by section number of the Act as enacted, Pub. L. 92-500.

> lation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.

118 Cong. Rec. S. 18534-35 (Daily ed., October 17, 1972).

Congress considered the veto message and overwhelmingly overrode the veto. In the House, the vote was 247 to 23; in the Senate, it was 52 to 12. The President's intention was later carried out by his directive to the Administrator to allot to the States $2 billion instead of the $5 billion authorized for fiscal 1973, $3 billion instead of the $6 billion authorized for fiscal 1974 and, although not an issue herein, $4 billion instead of the $7 billion authorized for fiscal 1975.

Respondent City of New York has obtained from the Court below an order which compels the Administrator to allot among the States the full amounts authorized by Congress. Respondent Campaign Clean Water has obtained an order for a *de novo* review of the Administrator's decision to determine if he abused his discretion. Petitioner seeks review of both cases, which have been consolidated in this Court.

INTEREST OF AMICUS CURIAE

The Court's decision in these cases will substantially affect the State of Minnesota by setting a precedent which will be decisive in its case against the Administrator in the United States Court of Appeals for the Eighth Circuit. Minnesota obtained from the United States District Court for the District of Minnesota, Fourth District, an order to compel the Administrator to allot to Minnesota the full sums Congress authorized to be appropriated for the construction of publicly owned

treatment works as provided in Sections 205 and 207 of the Act.[2]

The Administrator appealed the order to the Court of Appeals for the Eighth Circuit. Written briefs and oral argument have been presented to the Court of Appeals. The case is presently pending for decision. Minnesota's case involves virtually identical issues to those involved in the cases presently before the Court.

The Administrator's action resulted in a drastically reduced allotment to the State of Minnesota. For fiscal years 1973 and 1974 Minnesota received a total of $101.5 million instead of the $222.5 million authorized, or a total reduction of $121 million. The direct effect on Minnesota is that numerous sewage treatment works in the State will not be constructed or upgraded. Consequently, the cutback on the allotments to Minnesota guarantees that its municipalities and sanitary districts will fail to meet the requirements and goals of the Act.

There is an adverse environmental effect from the Administrator's refusal to allot because inadequately treated sewage and industrial wastes will continue to be discharged into Minnesota waters. The stoppage of construction of treatment works for fiscal 1973 is estimated to result in a flow of 285 million gallons per day of inadequately treated sewage. The pollution and health effects from untreated sewage are well established.

The State of Minnesota has great interest in achieving and maintaining high water quality necessary for the propagation

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[2] *State of Minnesota v. Fri*, No. 4-73, Civ. 133 (D. Minn., June 25, 1973). The opinion and order of Federal District Court Judge Miles W. Lord has not been reported. The factual references made herein by the State of Minnesota are based on affidavits that are part of the record in Minnesota's case. The affidavits were not disputed by the Administrator.

of fish and wildlife and recreation in and on its waters. The recreational benefits accruing to the State from fish and game are estimated to be valued at approximately $200 million per year. Pollution from untreated sewage primarily causes oxygen depletion and artificial enrichment of lakes and rivers which adversely affect the propagation of fish and recreational uses. Construction of secondary treatment facilities reduces or eliminates these detrimental effects.

Minnesota urges that the result in this case should be to require the Administrator to allot the Congressionally authorized funds now withheld from the States.

SUMMARY OF ARGUMENT

1. Under the Act the Administrator has no discretion to determine the amounts to allot among the States. The Act contains mandatory language that the $5 billion and $6 billion for fiscal years 1973 and 1974, respectively, " *shall be allotted by the Administrator.*" Congress intended the full sums authorized to be appropriated to be allotted among the States. This intent is manifested in the Act as a whole and its legislative history.

2. If the Administrator has been granted *any* discretion by the Act he exercised it erroneously. First, any discretion rests at the *obligation* stage instead of the *allotment stage.* Second, even if there existed discretion at the allotment stage it was flagrantly abused by the Administrator. His discretion is circumscribed by the bounds of the Act and may not be exercised for reasons remote and unrelated to the Act. Third, the refusal to allot 55% of Congressionally authorized funds was an abuse of discretion because it was in derogation of the policy and goals established by Congress in the Act. The impoundment of the authorized funds was an attempt to undo what Congress accomplished by exercising its Constitutional right to override the Presidential veto of the Act: emphatically mandating that the full $18 million be allotted to the States.

3. The Administrator's action does not fall under the narrow exception of the Administrative Procedure Act making nonreviewable actions totally committed to Agency discretion where the statutory authority is so broad that there is no law to apply. The Act provides definite standards against which the Administrator's action can be reviewed to determine if he has misconstrued his powers and abused his discretion.

ARGUMENT

I. THE ACT AND ITS LEGISLATIVE HISTORY INDICATE THE ADMINISTRATOR HAS NO DISCRETION TO CURTAIL AUTHORIZED FUNDS AT THE ALLOTMENT STAGE.

A. The Act Manifests Clear Congressional Intent to Attain Clean Water.

The Act is a comprehensive and far-reaching law designed to clean up the Nation's waters. The provisions for Federal financial assistance to construct publicly owned treatment works are major features of the Act and a keystone of the statutory objective. It is important that these financial provisions be put in proper context with other provisions of the Act relevant to the statutory scheme to attain clean water.

The Act begins by stating that its objective "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a). To achieve this ob-

jective, Congress declared as goals of the Act that "the discharge of pollutants into the navigable waters be eliminated by 1985" and that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." Section 101(a)(1), (2). Congress unequivocally stated in the Act that "it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works." Section 101(a)(4).

Title II of the Act is entitled "Grants for Construction of Treatment Works." The purpose of this title is "to require and to assist the development and implementation of waste treatment plants and practices which will achieve the goals of this Act." Section 201(a). The Administrator "is authorized to make grants to any State, municipality, or to intermunicipal or interstate agency for the construction of publicly owned treatment works." Section 201(g)(1). Congress "authorized to be appropriated to carry out this title . . . for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000 and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000." Section 207.

A state's share of the authorized amounts for fiscal 1973 and 1974 is determined by a statutory formula based on "the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears on the estimated cost of construction of all needed publicly owned treatment works in all of the States." Section 205. Allotments to the States commencing in fiscal 1975 are to be made in accordance with revised cost estimates submitted to and approved by Congress. Section 205(a).

The designated shares are to be allotted among the States by the Administrator. Those allotted funds then are available for grants to construct publicly owned treatment works within the State. Section 203. An individual applicant for a grant submits plans, specifications, and estimates for each proposed project to the Administrator for his approval. Approval of the plans, specifications, and estimates by the Administrator is deemed to constitute a contractual obligation of the United States for the payment of its proportional contribution to such project. Section 203(a).

Prior to final approval of a treatment works project, the Administrator must consider the "limitations and conditions" of Section 204. For example, the Administrator is to determine that (a) the treatment works is in conformity with any applicable State plan under Section 303(e) of the Act, (b) such works have been certified by the appropriate State water pollution control agency as entitled to priority over such other works in the State, (c) there are adequate provisions satisfactory to the Administrator for assuring proper and efficient operation and maintenance, and (d) the size and capacity of the works relate directly to the needs to be served by the works. Section 204(a)(2), (3), (4) and (5).

The Federal share of the construction costs for approved projects is 75 per centum. Section 202(a). Expenditures of allotted funds are to be made by the Administrator in the form of payments to the recipient of a grant as the work progresses and costs of construction are incurred on the project. Section 203(b).

The successive administrative stages involving Title II grants thus include:

(a) the *authorization* of funds to be appropriated, Section 207,

(b) the *allotment* by the Administrator of these funds among the States, Section 205,

(c) the *submittal* by the grantees of plans, specifications and estimates of treatment works projects to the Administrator for approval, Section 203,

(d) the *review* by the Administrator of the projects pursuant to the limitations and conditions of Section 204,

(e) the approval by the Administrator of the project which thereby *obligates* the Federal government to pay 75 percent of the eligible costs, Section 203, and

(f) the *payment* to the grantees by the Administrator of project progress payments from the allotted funds, Section 203, and the *appropriation* by Congress of the funds necessary to cover the Administrator's expenditures on the project.

The issues before the Court involve the Administrator's action at the *allotment* stage.

Title III of the Act is entitled "Standards and Enforcement." The discharge of any pollutant by any person is unlawful except when in compliance with various sections of the Act. Section 301(a). Persons operating publicly owned treatment works are included and are subject to enforcement actions.

Section 301(b) provides that "[i]n order to carry out the objective of this Act there shall be achieved . . ." for all publicly owned treatment works secondary treatment by July 1, 1977, and the best practicable waste treatment technology by July 1, 1983. States are prohibited from adopting or enforcing an effluent limitation that is less stringent than those established under the Act. Section 510.

Title VI of the Act is entitled "Permits and Licenses." Section 402 establishes the National Polutant Discharge Elimination System (hereinafter NPDES) which requires permits be obtained for the discharge of polutants. The discharges from publicly owned treatment works require an application for an NPDES permit. Section 402(a). These permits must "insure compliance with, any applicable requirements of sections 301, 302, 306, 307 and 403; . . . ." Section 402(b)(1)(A). Neither the Administrator nor a State can issue a permit to a publicly owned treatment works under Section 402 which does not insure that requirements of the existing water quality standards are complied with or that effluent limits of secondary treatment are achieved by July 1, 1977.

Any person, which by definition includes a municipality or a sanitary district, Section 502(5), found willfully or negligently violating the effluent limitations of Section 301 is punishable by a fine of not less than $2,500 nor more than $25,000 per day of violation or by imprisonment for not more than one year, or by both. Section 309(c)(1). Any person who merely violates Section 301 effluent limitations is subject to a civil penalty not to exceed $10,000 per day of such violation. Section 309(d).

If the Administrator finds any person in violation of Section 301, he is required to issue an order to obtain compliance or to bring a civil action. Section 309(a)(3). A person who violates an order issued by the Administrator is subject to the civil penalty provision. Section 309(d). Whenever a municipality is a party to a civil action brought by the United States, the State is to be joined as a party. The State is liable to the extent that its law "prevent[s] the municipality from raising revenues needed to comply with such judgment." Section 309(e).

Any citizen adversely affected may commence a civil action against any person who is alleged to be in violation of an effluent standard or limitation under the Act. Section 505(a) and (g). Federal district courts are given jurisdiction over these suits to enforce effluent standards and to apply any appropriate civil penalty under Section 309(d) of the Act. Section 505(a)(2). Any interested person may seek judicial review of any NPDES permit issued or denied under Section 402. Section 509(b)(1)(F).

The statutory scheme includes a broad objective, with declared goals and policies, established deadlines for achievement of effluent standards and limitations, permits for discharge of pollutants, and strong enforcement penalties to assure compliance. The Administrator's refusal to allot 55% of the funds authorized must be viewed from the total perspective of the Act. These features of the Act cannot be isolated from Sections 205 and 207. The Administrator's narrow focus on Sections 205 and 207 distorts the clear thrust of the Act which is to abate water pollution.

B. The Statutory Scheme Imposes a Clear Mandatory Duty Upon the Administrator to Allot.

The requirement to *allot* the full amounts is clear and unambiguous.

> Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, ***shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized,*** except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972.

(Emphasis added.) Section 205(a).

Contrary to the Administrator's contention, the authorized funds do not remain indefinitely available for allotment. Section 205(b)(1) provides:

> *Any sums allotted* to a State under subsection (a) shall be available for obligation under section 203 on and after *the date* of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of *the fiscal year for which such sums are authorized.* Any amounts *so allotted* which are not obligated by the end of such one-year period *shall be immediately reallotted* by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the *last allotment of sums* under this section. *Such reallotted sums* shall be added to the *last allotments* made to the States. Any sum made available to a State by *reallotment* under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

(Emphasis added.)

Only the funds *allotted* by the Administrator remain available for obligation. If the Administrator does not follow the statutory requirements by allotting and immediately reallotting[3] the authorized funds at the time and dates indicated,

[3] The State of Minnesota in its case obtained an Order dated June 25, 1974, for supplemental injunctive relief compelling reallotment in 1974 of the state's share of unobligated 1973 funds. It was Minnesota's position that if the Administrator did not "immediately reallot" the fiscal 1973 funds which were ordered to be allotted these funds would be irretrievably lost and not available for obligation. The Administrator by the supplemental Order was thereby not allowed to accomplish by reason of a lengthy appeal process what he was unable to accomplish under the Order to allot the full sums authorized for Minnesota.

the unallotted funds lapse and are irretrievably lost to the States. The mandatory language of Section 205 precludes *supplemental allotments*. Numerous courts have arrived at the same conclusion. *City of New York v. Train*, 494 F.2d 1033 (1974); *State of Ohio v. Environmental Protection Agency, et. al.*, C. 73-1061 and C. 74-104 (N.D. Ohio, June 26, 1974); *State of Maine v. Train*, Civ. No. 14-51 (D. Maine, June 21, 1974); *State of Florida v. Train*, Civ. No. 73-156 (N.D. Fla., Feb. 25, 1974); *State of Texas v. Ruckelshaus*, C.A. No. A-73-CA-38 (W.D. Tex., Oct. 2, 1973); *Martin-Trigona v. Ruckelshaus*, No. 72-C-3044 (N.D. Ill., June 29, 1973); and *State of Minnesota v. Fri*, No. 4-73, Civ. 133 (D. Minn., June 25, 1973).

The State of Minnesota does not desire to disparage the declared intentions of the Administrator eventually to commit the full amount of funds authorized by Congress. However, the Administrator has indicated in the Federal Register that "[a]llotments shall be made not later than the January first preceding the beginning of the fiscal year for which authorized, except for the allotment for fiscal year 1973 which is made herein." 38 Fed. Reg. 5331, §35.910-1(d), Feb. 28, 1973. Moreover, the Administrator has not indicated in the Federal Register any intention to allot the full sums authorized by Congress. No regulations have been promulgated regarding the procedure under which these funds are to be "supplementally" allotted to the States. The only way the State of Minnesota and other States can be legally certain that all authorized funds will be made available to them for obligation is by the Administrator's adherence to the statutory allotment requirement of the Act.

C. The Amounts Authorized Were Based on National Needs to Achieve the Act's Purposes.

The designated sums in Section 207 were based on estimates of the needs of the Nation to construct and upgrade sewage treatment works to meet the requirements of the Act. The Congressional Record is replete with evidence supporting the $18 billion figure.

The National League of Cities and the U.S. Conference of Mayors estimated the total construction needs of municipalities at approximately $35 billion between the years 1972 and 1977. 118 Cong. Rec. H. 10267 (Daily ed. Oct. 18, 1972). The U.S. Environmental Protection Agency's *own* cost estimates for constructing waste treatment facilities planned for fiscal years 1972 through 1974 was $14.5 billion. The former Administrator of the Agency, William Ruckelshaus, explained in his letter to the President urging him *not* to veto the Act that the dollar figures were consistent with the needs estimate that his Agency had provided Congress.[4] The Ruckelshaus letter states in pertinent part as follows:

> The total value of construction initiated in the near-term under the enrolled bill is expected to correspond closely to the total value of construction that would have been initiated under the Administration bill. Under the Administration's proposal, communities were free to continue to initiate reimbursable projects, were not constricted by the $6 billion authorization, and could have substantially increased this amount. Reimbursable projects are precluded

[4] See also Senator Muskie's explanation of how the Conferees arrived at the authorized levels. 118 Cong. Rec. S.18548 (Daily ed. Oct. 17, 1972).

under the enrolled bill and the $18 billion contract grant authority represents a ceiling, while the Administration's $6 billion proposal represented a floor. With the projected close correspondence in a total near-term value of construction starts, the potential inflationary impact upon the entire construction sector would be minimized.

The total amount of contract grant authority contained in the enrolled bill is formulated from the Administration's estimate of construction needs as submitted to the Congress in February of this year. The total Federal share of 75% would amount to $13.6 billion. This needs estimate did not include funds for combined storm and collection sewers, or for recycled water supplies. These are project eligibilities newly specified by the enrolled bill.

This needs estimate provided to the Congress was constructed to support the commitment of the President in his State of the Union message of January 22, 1970, to "put modern municipal waste treatment plants in every place in America where they are needed to make our waters clean again, and to do it now." This commitment was repeated in the February 1970, Message on the Environment, which enunciated funding support for "every community that needs it with secondary waste treatment, and also special, additional treatment in areas of special need, including communities of the Great Lakes." The commitment was re-endorsed in the February, 1971, Message on the Environment with a statement that we should provide "adequate funds to ensure construction of municipal waste treatment facilities needed to meet water quality standards."

(Emphasis added.) 118 Cong. Rec. S. 18546 (Daily ed. Oct. 17, 1972).

Senator Muskie asked the Senate some crucial questions regarding the high costs of attaining clean water and gave the following answers:

> Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make possible life on this planet? Can we afford life itself? Those questions were never asked as we destroyed the waters of our nation, and they deserve no answers as we finally move to restore and renew them. These questions answer themselves. And those who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this crisis.
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> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the Federal Government in 75% grants to municipalities during fiscal years 1973-75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation.

(Emphasis added.) 118 Cong. Rec. S. 16870 (Daily ed. Oct. 4, 1971).

The Court of Appeals for the District of Columbia in its decision in *City of New York v. Train, supra*, extensively reviewed legislative history that preceded adoption of the $18

disagreement with the President's dire predictions of the Act's impact on the economy.

Furthermore, it was the expressed intent of Congress that the Administrator's discretion would be limited by the purposes and objectives of the Act. Congressman Jones, in the course of his explanation of the Conference Report to the House, declared that "[t]he Congress has given to the Administrator the most explicit guidance that it could contrive as to what factors and parameters he is to take into account in the administration of this act."[37] Moreover, Senator Muskie, in discussing the Conference amendments to Sections 205 and 207, which were intended to emphasize the Administrator's obligational and expenditure flexibility, also addressed the question of the limits of the Administrator's discretion, stating that "[t]he conferees do not expect these provisions to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the act."[38]

In short, the Administrator's discretion under Section 203 is limited by the letter and intent of the Act. He may not use the narrowly circumscribed authority over project approval to defeat or postpone the clean water goals of the Act.

[37]118 Cong. Rec. H 9119 (Daily ed. Oct. 4, 1972). These factors are set out in Section 204 of the Act, 33 U.S.C. § 1284 (Supp. 1974).

[38]118 Cong. Rec. at S 16871 (Daily ed. October 4, 1972).

Amici urge the Court to consider this portion of their argument most seriously. The Administrator has effectively announced in his brief[39] that if he loses this round and is required to allot, he will attempt to circumvent the Court's judgment by placing the newly allotted funds in "reserve" accounts and simply refuse to obligate them. This would obviously violate the Act, since these sums would clearly not be "available" for obligation, notwithstanding the Administrator's sophistical argument to the contrary.[40] The Court must make it plain that the Administrator must allot all sums authorized and that no alternate actions that likewise defeat the purposes of the Act will be tolerated.

C. *The Administrator's argument that he is authorized to control the "rate" of spending by controlling the timing of allotments is unsupported in the Act and is inconsistent with continual funding mechanism of "reallotment".*

The Administrator, in a vain attempt to make control over allotments equivalent to control over the "rate" of spending, now says he expects ultimately to allot the sums he has withheld.[41] By periodically augmenting the allotments, so the new argument goes, the Administrator extends the time in which the authorized sums are available and hence reduces the

[39]Brief for Respondent at 27-28.

[40]*Id.* at 28, n. 12.

[41]Brief for Petitioner at 26, 29.

"rate" of spending. This is pure sophistry. All that this accomplishes is postponement of the program and the goals it was designed to achieve. As the court of appeals noted in *City of New York:*[42]

> . . . the Act nowhere mentions any type of later augmentation procedure, and rather states in section 205(a) that "*the* allotment for fiscal year 1973 shall be made not later than . . . ." (Emphasis the Court's).

Moreover, if Congress had intended the Administrator to have the kind of control over allotment he seeks to establish in this case, there would have been scant need for Congress to provide for the mechanism of automatic reallotment. 33 U.S.C. § 1285(b)(1)(1974 Supp.). Plainly, Congress constructed the statutory mechanisms of allotment and reallotment to provide for continual funding over an extended period of time to remove the uncertainty that had plagued the grant process prior to the 1972 Act. As indicated earlier, the notion of administrative discretion to allot any given amount at any given time is totally at odds with this carefully conceived statutory scheme.

D. *Neither the doctrine of sovereign immunity nor that of political question is applicable to this controversy.*

[42]Combined Appendix at 33A.

Amici are of the firm view that the Administrator has no discretion at the allotment stages. Nevertheless, we do not believe that a contrary conclusion would require, as the Administrator contends,[43] dismissal of the suit.

First, the action falls squarely within the exception to the doctrine of sovereign immunity which allows suits against federal officials who have allegedly acted beyond their statutory powers or have exercised their statutory powers in a constitutionally void manner. *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 689 (1949). The mere fact that discretion is vested in a federal administrative officer does not mean that he has free reign to abuse that discretion, and whether an abuse has occurred, *i.e.*, whether the officer has exceeded his statutory authority, is clearly within the *Dugan* and *Larson* exception.

Moreover, sovereign immunity has been waived by the United States in cases of this sort by enactment of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*. Section 10 of the APA, 5 U.S.C. § 702, provides quite plainly and simply that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action wthin the meaning of a relevant statute, is entitled to judicial review thereof."

[43] *Brief for Petitioner at 30, et seq.*

In *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961), the court explained the impact of the APA on sovereign immunity thusly:

> By providing judicial review in an action brought by "any person adversely affected or aggrieved by any agency action" Congress permitted suits which under established tests would certainly be barred as suits against the government . . . The Act thereby makes a clear waiver of sovereign immunity in actions to which it applies." *Estrada v. Ahrens, supra*, 296 F.2d at 698.

Accord, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 873-74 (D.C. Cir. 1970).[44]

The Administrator tries to hide behind the provision of the APA that excludes suits complaining of actions committed to agency discretion by law. 5 U.S.C. § 701(a). This Court has declared this to be a "very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). The statute here is not drawn in "broad terms," but rather in such highly detailed and specific terms as to negative even the slightest degree of discretion at the allotment stage. But assuming, *arguendo*, some discretion exists, it is certainly not unbridled. The Act's express commitment to specific deadlines and goals and the unmistakable evidence in the legislative history of

[44]"It seems axiomatic to us that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; any other construction would make the review provisions illusory." *Scanwell Laboratories, Inc. v. Shaffer, supra*, 424 F.2d at 874.

Congressional resolve to achieving these deadlines and goals provides ample guidelines for judicial determination of whether that discretion has been abused.

The Administrator also argues that to try to resolve whether there has been an abuse of discretion in this case would require the courts to decide a "political question."[45] The standards for determining whether this issue presents a nonjusticiable political question were provided by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962):

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards of resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question. 369 U.S. at 217.

As in his Administrative Procedure Act argument, the Administrator urges again that there are no criteria by which to judge whether he has abused his discretion. The Court, however, is not being asked to take over the management of the Environmental Protection Agency, or to assume the weighty role of the

[45]Brief for Petitioner at 47.

President of the United States; it is being asked to construe a statute and to determine whether Congress intended to grant the Administrator discretion to take the action complained of here. Since *Marbury v. Madison*, it has always been "emphatically the province and duty of the judicial department to say what the law is". 5 U.S. (Cranch) 137, 177 (1803).

This Court recently reaffirmed the principle of *Marbury v. Madison* in a case in which the doctrine of political question was similarly urged as a bar to judicial review of Executive action. *United States v. Richard M. Nixon*, 42 U.S.L.W. 5237 (July 24, 1974). The issue was whether the doctrine prevented the Court from deciding whether the President had to comply with a subpoena to produce certain tape recordings and documents relating to his conversations with aides and advisers. The argument was made, as it is impliedly made here, that the Judiciary should defer to the judgment of the Executive as to what the law requires. The language used in rejecting the claim is particularly applicable to the instant controversy.

> Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art. III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite

> government. The Federalist, No. 47, p. 313 (C. F. Mittel ed. 1938). We therefore reaffirm that it is "emphatically the province and the duty" of this Court "to say what the law is" with respect to the claim of privilege presented in this case. *Marbury v. Madison, supra* at 177. *United States v. Richard M. Nixon, supra*, 42 U.S.L.W. at 5244.

Here, too, the Court cannot concede to the Executive the intrinsically judicial determination of whether the impoundment of such vast sums of money was authorized by Congress in the Act.

CONCLUSION

The court of appeals in *City of New York* was eminently correct in ruling that the Administrator was required to allot the full amounts authorized by the Act for waste treatment construction grants. *City of New York* should therefore be affirmed and *Campaign Clean Water* should be reversed and judgment rendered for full allotment in favor of Respondent Campaign Clean Water.

Even if the Court be convinced that some discretion at the allotment stage was vested in the Administrator by the Act, *amici* would still pray that the court of appeals judgment in *Campaign Clean Water* be reversed, and the district court's judgment be affirmed, since the present state of the record — the record of the marked disparity between what the Administrator has allotted and what is really needed to meet the letter and intent of the Act — shows clearly that that discretion has been flagrantly abused.

Respectfully submitted,

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PROOF OF SERVICE

I, Philip K. Maxwell, one of the attorneys for the States of Texas, Wisconsin, Missouri, Oklahoma and Kansas, *amici* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 15th day of August, 1974, I served copies of the foregoing brief to the Supreme Court of the United States and on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Robert H. Bork, Solicitor General, Carla Hills, Assistant Attorney General, Daniel M. Friedman, Deputy Solicitor General, Edmund W. Kitch, Assistant to the Solicitor General, Robert E. Kopp, and Eloise Davies, Attorneys, Department of Justice, Washington, D.C., 20530.

2. Norman Redlich, Corporation Counsel, John R. Thompson, First Assistant Corporation Counsel, Evan A. Davis, Gary Mailman, and Alexander Gigante, Jr., Assistant Corporation Counsels, Attorneys for the City of New York, Municipal Building, New York, New York, 10007, and James R. Atwood, Covington & Burling, 888 — 16th Street, N.W., Washington, D.C., 20006, Of Counsel, in duly addressed envelopes with air mail postage prepaid.

3. Alan B. Morrison and W. Thomas Jacks, Suite 700 — 2000 P Street, N.W., Washington, D.C., 20036, Attorneys for Respondent, Campaign Clean Water, in a duly addressed envelope with postage prepaid.

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ADDENDUM I

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

May 28, 1974

TO ALL COUNSEL OF RECORD:

No. 73-3965 - State of Texas, et al, v.
No. 73-4026 - Russell E. Train, Administrator of the Environmental Protection Agency.

[Argued & Submitted 4-29-74 - N.O. West Courtroom]

Gentlemen:

I am directed by the Court to advise that the disposition of the referenced cases is being withheld pending decision of the Supreme Court in the cases *Train v. City of New York*, (73-1377), *Train v. Campaign Clean Water* (73-1378), certiorari granted April 29, 1974.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Richard E. Windhorst, Jr.
Richard E. Windhorst, Jr., Chief
Judicial Support Division

REW, Jr.:rcv

Messrs. Robert E. Kopp &
Eloise E. Davies
Mr. Theodore L. Priebe
Mr. Paul C. Duncan
Mr. Philip Maxwell
Mr. Curt Schneider

WATER FUNDS: EPA Regional Admr. Busch says Texas has received the lion's share of wastewater grants awarded in Region VI — Texas, Louisiana, Arkansas, Oklahoma and New Mexico. Of the $69,101,286 awarded in the region since July, 1973, Texas got $37,441,255. The funds come from the Congressionally appropriated $9 billion for the states in fiscal years 1973, 1974, and 1975. With two of the years over, EPA has allocated $3 billion nationwide, or $134,756,239 to States in Region IV. Busch said, "The agency expects to award much of the remaining $6 billion in the next 12 months."

Busch added, "I am extremely pleased with the progress being made in our construction grants program, and am confident that a solid base has been established to carry forward a program in achieving our goal of clean water. We will be working closely with State and local officials in the months ahead to keep the program moving. I am also pleased to announce that the States in Region VI were the first in the nation to submit their priority lists for FY '75 funds."

FUND DEFICIT: Even with Texas getting the lion's share of the Federal money available, the Water Quality Board says that **Texas cities have 204 projects that won't be funded** because Federal funds available in FY '75 are $27,000,000 short of what is needed. The WQB's project list includes $169,100,000 in projects, while available Federal funds amount to $142,100,000. Board Exec. Dir. Yantis wrote Texas members of Congress about the problem and included a detailed list of which projects will be funded and which ones are caught in the $27 million deficit. He added that "to complete construction just for this list" would require $615,000,000 in the future and $675,000,000 if related costs, such as infiltration studies, are included. Yantis said that means the real deficit in grant funds is "approximately $450 to $500 million."

Projects falling into the **$27,000,000-short and-won't-be-funded category** by Congressional district, are: **Dist 1** — Joaquin, Seven Points, Halfsville, Campbell, Omaha, Bullard, Douglassville Marietta, Murchison, Reno, Broaddus, Winfield, Tenaha, Lennius MUD and Athens; **Dist 2** — Montgomery County MUD 6, Liberty-Danville FWSD 1, Lazy River Improvement Dist. of Montgomery County, Devers, Coldsprings, Sour Lake, Kirbyville, North Zulch MUD, Whispering Oaks, Orange, Evadale ISD, Koontze, Grapeland, Tucker ISD, Woodville, Jewett, Kennard and Hardin County WCID 1; **Dist 3** — Richardson, Little Elm, Glenn Heights, Dallas (3 projects), Murphy, Woodland Hills, Corinth and Dallas County Community College; **Dist 4** — Howe, Lindale, Highland Village, Rowlett, Kerrp, Royse City, Campbell, Bullard, Little Elm, Lake Dallas MUA, Glenn Heights, Collinsville, Aubrey, Tom Bean, Pilot Point, Fate, Corinth and Westminster; **Dist 5** — the projects in Dallas County listed in Dist 3, plus Seagoville; **Dist 6** — The projects in Dallas County in Dist 3 plus Garrett, Streetman and Hubbard; **Dists 7, 8, 18 and 22**, Harris FWSD 6, Tomball, Spenwick Place MUD, College View MUD, Clearwoods Improvement Dist, Harris County WCID 1, Port of Houston, Lomax, Harris UD 5, Fort Bend WCID 2; **Dist 9** — Galveston WCID 19, Beach City, Jefferson WCID 10, Bevil Oaks, San Leon MUD, Port of Galveston and Jefferson FWSD 1; **Dist 10** — Pflugerville, Burton, Carmine, Florence, Hays County-Wimberly WSD, Dime Box, Gladden FWSD, Clay, Sunset Valley, Hempstead, Snook, Fayett WCID and San Marcos;

Dist 11 — Gatesville, Bertram, Thorndale, McGregor, Bell WCID 4, Fort Gates, Goldthwaite, Round Rock, Hutto, Lorena, Milam WCID 1, Marble Falls WCID 1, Hewitt, Morgan, Lott, Itedell and Lacy-Lakeview; **Dist 12** — North Tarrant MWD and Saginaw; **Dist 13** — Megargel, Windthorst, Childress and Canyon; **Dist 14** — Wharton WCID 19, Victoria-Guadalupe Blanco RA, Corpus Christi and Nueces WCID 15; **Dist 15** — Port Mansfield PUD and Edcouch; **Dist 16** — Odessa, Van Horn, Goldsmith, Ft Hancock WCID 1 and Barstow; **Dist 17** — Haskell, San Saba, Anson, Tye, Rotan, Cross Plains, De Leon, Newark, Jayton, Comanche, Gainesville, Goree, Forsan and Stephenville; **Dist 19** — Shallowater, Odessa (listed in Dist 16), Abernathy, New Deal and Smyer; **Dist 20** — San Antonio (2 projects) and Somerset; **Dist 21** — those listed in Dist 20 plus Sunrise Beach MUD 1, Boerne, Junction, Fredericksburg, Crockett WCID 1, Sterling City, Brackettville, Winters, New Braunfels and Mertzon; **Dist 23** — Those listed in Dist 20 plus Carrizo Springs, Laredo, Natalia, Jourdonton, Big Wells, Dilley and Maverick County; **Dist 24** — those listed in other Dallas County districts plus Flower Mound and Sanger.

In The

Supreme Court of the United States

October Term, 1974

No. 73-1377

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, ET AL.

No. 73-1378

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

CAMPAIGN CLEAN WATER, INC.

On Writs of Certiorari to the United States Courts of Appeals for the District of Columbia and the Fourth Circuits

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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In The

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BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

OPINIONS BELOW

The opinion of the court of appeals in *City of New York*, No. 73-1377 (Pet. App. A, pp. 1A-34A), is reported at 494 F.2d 1033. The opinion of the district court (Pet. App. E, pp. 59A-78A) is reported at 358 F. Supp. 669.

The opinion of the court of appeals in *Campaign Clean Water*, No. 73-1378 (Pet. App. B, pp. 35A-53A), is re-

ported at 489 F.2d 492. The opinion of the district court (Pet. App. F, pp. 79A-100A) is reported at 361 F. Supp. 689.

QUESTIONS PRESENTED

1. The question presented in *City of New York* is whether Sections 205(a) and 207 of the Water Pollution Control Act Amendments of 1972 authorize the Administrator, acting at the direction of the President, to control the rate of spending under the program by allotting less than the full amounts authorized by the Congress.

2. The question presented in *Campaign Clean Water* is whether the court of appeals, upon recognizing that the question whether the Administrator has discretion to allot less than the amounts authorized was no longer an issue in case, should have directed the district court to dismiss the complaint instead of remanding the case for a hearing *de novo* to determine whether the Administrator abused his discretion in making the particular allotments.

INTEREST OF THE AMICUS

The interest of the Commonwealth of Virginia lies in the interpretation of §§ 205(a) and 207 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.*, in the context of appellant's assertion that he is authorized, pursuant to those sections, to refuse to allot, by specified deadlines, the maximum amount of funds authorized to be appropriated in each of fiscal years 1973 and 1974.

All publicly-owned treatment plants within the Commonwealth are required to comply, by July 1, 1977, with applicable effluent limitations established pursuant to the Act.

The refusal of the appellant to allot, and make available for obligation, all funds authorized will compound the serious shortfall of federal funds needed by political subdivisions of the Commonwealth to effect compliance with the requirements of the Act.

ARGUMENT

I.

Sovereign Immunity Is No Bar To A Suit Which Challenges An Action Taken Pursuant To A Power If The Exercise Of That Power Is Not Discretionary Or If The Exercise Of That Power Is In Excess Of Statutory Authority.

The sovereign immunity test has been firmly established by this Court. This test provides that if a statute confers a power, the exercise of which is not within the discretion of the Administrator, sovereign immunity will not bar a suit which seeks to challenge the validity of the action taken pursuant to that power. This test further provides that, if a statute confers a power, the exercise of which is within the discretion of the Administrator, the general rule is that sovereign immunity will bar a suit, to which the United States has not consented or otherwise waived its immunity, which seeks to challenge the validity of the action taken pursuant to that power. Notwithstanding this general rule, sovereign immunity will not bar such a suit if:

1. The exercise of the power allegedly exceeds statutory authority; or

2. The exercise of the power is unconstitutional, even though that exercise is within the scope of statutory authority. *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Malone* v. *Bowdoin*, 369 U.S. 643 (1962).

For the reasons developed *infra*, it is clear that sovereign immunity does not bar a suit against the Administrator challenging the validity of his refusal to allot initially all sums authorized to be appropriated pursuant to §§ 205(a) and 207 of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter "the Act"), 33 U.S.C. §§ 1285(a), 1287 (Supp. II, 1972). This conclusion must follow because the duty of the Administrator to allot all funds authorized is nondiscretionary. Even assuming, *arguendo*, that this duty is discretionary, the action taken is reviewable by this Court, the power must not be exercised so as to frustrate the attainment of the goals of the Act, and the power has been exercised in excess of statutory authority.

II.

The Administrator Has No Discretion To Refuse To Allot Initially All Sums Authorized To Be Appropriated Under The Act.

A.

The Intent Of The Act Requires That All Sums Authorized To Be Appropriated Be Allotted Initially.

The analysis of the question presented will be clearer if the legislative goals and statutory mechanism set up under the Act are briefly outlined.

The Act sets forth, *inter alia*, the following national goals and policy: that the discharge of pollutants be eliminated by 1985; that an interim goal of water quality be achieved by July 1, 1983; and, that federal financial assistance be provided to construct publicly-owned waste treatment works. See § 101(a).

To implement these goals and policies, the Congress prohibited the discharge of any pollutant by any person except as in compliance with, *inter alia*, §§ 301(b)(1)(B), 301(b)(1)(C), and 402. See § 301(a). Publicly-owned treatment works must provide, by July 1, 1977, secondary treatment [§ 301(b)(1)(B)], or higher levels of treatment required to implement water quality standards [§ 301(b)(1)(C)], whichever is more stringent. These deadlines for compliance with technological limitations are required to be incorporated into individual discharge permits issued pursuant to § 402.

Title II of the Act sets forth the mechanism by which the United States provides grant funds to underwrite 75 percent of the costs of compliance with the foregoing deadlines and limitations. The Administrator is authorized to make such grants. See § 201(g)(1). The Act provides an authorization not to exceed $18 billion for fiscal years 1973, 1974, and 1975. See § 207. The Administrator is required to allot sums authorized to be appropriated to the states in accordance with their needs. See § 205(a). The approval of the Administrator of plans, specifications, and estimates for a treatment works project constitutes a contractual obligation of the United States to pay 75 percent of the costs of such construction. See §§ 203(a) and 202(a). Sums allotted but not obligated within a prescribed time must be reallotted to the states. See § 205(b). A state may utilize future allotments under certain conditions if it wishes to get a headstart towards compliance with the statutory deadlines: See § 206(f)(1).

The Administrator is compelled to enforce compliance with deadlines and technological limitations, and he has available to him a variety of remedies. Whenever a political subdivision of a state is a party to a suit brought by the Administrator, the state shall be joined as a party and shall be liable for the payment of any judgment, including the cost of compliance with applicable deadlines and limitations, to the extent that the political subdivision may not under state law raise the required revenues. See § 309. Citizens

may bring suit in federal court, regardless of the amount in controversy, to spur such enforcement by the Administrator.

The funding mechanism under the Act is a subject before this Court. The Commonwealth concurs with the court of appeals that the term "shall allot" in § 205(a) and the term concerning sums "not to exceed" in § 207 are not susceptible to a "plain meaning" analysis. *City of New York* v. *Train*, 494 F.2d 1033, 1039 (D.C. Cir. 1974). This Court must construe these provisions to discover their true intent. *Utah Junk Co.* v. *Porter*, 328 U.S. 39 (1946). This duty is clear where the language of the statute is of doubtful meaning. *Application of Martin*, 195 F.2d 303 (C.C.P.A.), *cert. denied*, 344 U.S. 824 (1952). In order to determine the true legislative intent, resort may be had to the legislative history of the Act. *United States* v. *Henning*, 344 U.S. 66 (1952); *Wilderness Society* v. *Morton*, 479 F.2d 842, 855 (D.C. Cir. 1973).

Congress manifested a clear intent to commit a total of $18 billion in federal grant funds to underwrite the federal share of the costs of constructing publicly-owned treatment works by the deadlines established in the Act. An analysis of the legislative history of the Act shows that the Congress first set the goals it wished to achieve. See "A Legislative History of the Water Pollution Control Act Amendments of 1972," Committee Print, Committee on Public Works, 93rd Cong., 1st Sess., January 1973, 3, 120, 164-65, 283, 894, 1535 (hereinafter cited as Legis. Hist.). Second, the Congress established the deadlines by which these goals would be achieved. *Id.* at 32, 254, 303-04, 963, 1608-09. Third, the Congress determined the cost of meeting these deadlines. *Id.* at 98-9, 100, 115, 120, 164-65, 185, 189-90, 243, 266. Fourth, the Congress provided corresponding authorizations of funds to underwrite these costs. *Id.* at 26, 164-65, 189-90, 243, 266, 298, 1452, 1591-92. During the protracted consideration of the bills which resulted in the Act, the deadlines were correspondingly extended to accommodate the required lead time for construction (*Id.* at 1209), and the authorizations were raised to correspond to higher Administration estimates of the costs of compliance with the deadlines. *Id.* at 164-65, 189-90, 266. These conclusions are consistent with the interpretation by the court of appeals of the overall intent of the Act. *City of New York* v. *Train*, *supra*, at 1039-42.

B.

THE HARSHA AMENDMENTS TO §§ 205(a) AND 207 DID NOT AUTHORIZE THE ADMINISTRATOR TO REFUSE TO ALLOT INITIALLY ALL FUNDS AUTHORIZED.

Prior to the Harsha Amendments, § 207 unequivocally authorized a total of $18 billion for the three year period ending on June 30, 1975. Section 205(a) required the Administrator to allot all sums authorized by specified deadlines. It is clear that, in view of the deadlines for compliance established under the Act [§ 301(b)(1)] and the lead time required for construction (Legis. Hist. 1209), the Congress intended that all funds authorized would be obligated by the Administrator prior to June 30, 1975. See S. Rep. No. 414, 92nd Cong., 1st Sess. 35 (1971), Legis. Hist. 1453.

The Harsha Amendments inserted the term "not to exceed" in § 207 and deleted the word "all" from § 205(a). The intended result of these changes is fully discussed by the court of appeals in its opinion. That court found that the intended result of the amendments was to provide the Administrator with flexibility to control the rate of spend-

ing, *i.e.*, the rate at which obligations would be made, rather than the discretion to refuse to allot and to obligate the entire amount authorized by § 207. *City of New York* v. *Train, supra* at 1042-46. The Commonwealth concurs in this interpretation because it is consistent with the expressed intent of Congress to effect compliance with the deadlines of the Act and to minimize the fiscal impact of expenditures made pursuant to the Act. The Congress could not have meant to give the Administrator the discretion to allot less than the full amounts authorized because, with such discretion, the Administrator could control the total amount available to be spent, and, in turn, could frustrate the attainment of the objectives of the Act.

Since the Congress did not grant to the Administrator the discretion to refuse to allot initially the full amounts authorized, such refusal is in excess of statutory authority, and, accordingly, sovereign immunity is no bar to a suit alleging the invalidity of that action. *Malone* v. *Bowdoin, supra.*

III.

Even Assuming, Arguendo, That The Administrator Has The Discretion To Refuse To Allot The Full Amounts Authorized, The Exercise Of That Discretionary Authority Is Subject To Judicial Review And Must Not Frustrate The Goals Of The Act. If The Action Complained Of Produces Such Frustration, Sovereign Immunity Will Not Bar Legal Action.

A.

THE ACTION OF THE ADMINISTRATOR IS SUBJECT TO JUDICIAL REVIEW.

It is settled that a court may inquire into the exercise by an administrator of discretion conferred by statute to determine whether or not that discretion was exercised in such

a manner as to make impossible the attainment of the objectives of the statute. *Kendall* v. *United States,* 37 U.S. (12 Pet.) 524 (1838); *National Automatic Laundry and Cleaning Council* v. *Shultz,* 443 F.2d 689 (D.C. Cir. 1971); *Campaign Clean Water* v. *Train,* 489 F.2d 492, 498 (4th Cir. 1974).

B.

THE ADMINISTRATOR'S REFUSAL TO ALLOT ALL SUMS AUTHORIZED HAS CAUSED, OR GREATLY CONTRIBUTED TO, THE INABILITY OF VIRGINIA TO COMPLY WITH THE OBJECTIVES OF THE ACT.

All publicly-owned treatment works are required to comply by July 1, 1977, with effluent limitations based on secondary treatment or with limitations required to implement applicable water quality standards. The Administrator estimated that $424.4 million in federal funds would be required to underwrite the federal share of the costs of compliance with these limitations and deadlines. S. Rep. No. 92-1236, 92nd Cong., 2d Sess. 15 (1972), Legis. Hist. 296.

The Congress clearly intended to provide the authorized funds at an early time in the period required for compliance. This intent has been discussed *supra,* and is evidenced by congressional recognition of (1) the lead time required to plan, design, and construct treatment works (Legis. Hist. 1209); (2) the advanced construction provisions of § 206 (f)(1); and, (3) the notation with approval of phased funding (Legis. Hist. 294).

On November 22, 1972, the Administrator refused to allot to Virginia $174.9 million that should have been allotted and made available for obligation during fiscal years 1973 and 1974. In taking this action, the Administrator allotted to Virginia only $145.6 million. The Commonwealth im-

mediately proceeded in good faith to submit to the Administrator grant applications within the limits set by this allotment. The full amount allotted for these two fiscal years has not yet been fully obligated. This is not the result, however, of a paucity of qualified projects in the Commonwealth. Rather, since the federal share of total costs of applications submitted was equal to the available allotment, and since every application has not yet been approved, the full allotment has not yet been obligated.

The Commonwealth now finds herself in dire straits. Her present needs for federal funds, as determined by the Administrator, are $1.008 billion. These funds are required to underwrite the federal share of the costs of compliance with the effluent limitations contained in § 301(b) of the Act. These increased needs are due to, *inter alia*, more refined cost estimates, new requirements established by the Administrator, and inflation.

In view of the shortfall in required federal funds and the 30-45 month lead time required for construction, it is now clear to the Commonwealth that all of her publicly-owned treatment works will not meet the July 1, 1977, deadline. Accordingly, the Commonwealth has filed suit [*State Water Control Board* v. *Train*, Civil No. 74-0328-R (E.D. Va., filed July 19, 1974)] in which she seeks relief from enforcement of the July 1, 1977, deadline. The Commonwealth has requested the court to declare that, for any publicly-owned sewage treatment plant, compliance with applicable limitations shall not be required until federal funds are made available in an amount sufficient to underwrite 75 percent of the costs of compliance with the Act, and until a reasonable time has been allowed for completion of construction. The Commonwealth does not seek a blanket extension of this deadline; rather, she seeks to have the

deadline set on a case-by-case basis, and she has suggested a means under the Act whereby the court can readily supervise compliance with revised deadlines.

It must be emphasized that, notwithstanding refined needs estimates and inflation, the impoundment of more than one-half of the funds authorized for fiscal years 1973 and 1974 has caused, or contributed greatly to, the impossibility of compliance by Virginia's political subdivisions with the July 1, 1977, deadline. This impoundment has frustrated the clear legislative objectives of the Act. Such frustration is an abuse of discretion which is open to judicial review, and on account of which judicial relief should be afforded. Further, since the action taken is an abuse of discretion, a suit challenging the validity of that action is not barred by sovereign immunity. *Malone* v. *Bowdoin*, *supra*.

IV.

CONCLUSION

It is clear from an examination of the legislative history of the Act that the Congress did not intend to confer upon the Administrator the discretion to refuse to allot the full sums authorized to be appropriated pursuant to § 207 of the Act. Accordingly, the decision of the court of appeals in *City of New York* v. *Train* should be affirmed.

Even assuming, *arguendo*, that such discretion does exist, the Administrator must not exercise that discretion in such a way as to frustrate the attainment of the objectives of the Act. The court may review an action which results from an alleged abuse of discretion to determine whether the action taken would frustrate the Act's objectives. If the court determines that these objectives are frustrated by the action complained of, sovereign immunity will not bar a suit

challenging the validity of that action. The decision of the court of appeals in *Campaign Clean Water* v. *Train* should be affirmed.

Respectfully submitted,

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IN THE

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UNITED STATES

October Term, 1973
Nos. 1377 and 1378

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, *Petitioner*,

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and

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, *Petitioner*,

v.

CAMPAIGN CLEAN WATER, INC., *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE FOURTH CIRCUIT

AMICI CURIAE BRIEF FOR THE STATE OF WASHINGTON AND COMMONWEALTH OF PENNSYLVANIA

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RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, *Petitioner*,

v.

CAMPAIGN CLEAN WATER, INC., *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE FOURTH CIRCUIT

AMICI CURIAE BRIEF FOR THE STATE OF WASHINGTON AND COMMONWEALTH OF PENNSYLVANIA

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1973
Nos. 1377 and 1378

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, *Petitioner*,

v.

CITY OF NEW YORK, *et al.*, *Respondents.*

and

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, *Petitioner*,

v.

CAMPAIGN CLEAN WATER, INC., *Respondent.*

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AMICI CURIAE BRIEF FOR THE STATE OF WASHINGTON AND COMMONWEALTH OF PENNSYLVANIA

The State of Washington and the Commonwealth of Pennsylvania, by and through their Attorney Generals, file this Amici Curiae brief under Rule 42(4) of this Court.

STATEMENT OF THE INTERESTS OF THE AMICI CURIAE

All who are acquainted with the State of Washington know that its lifeblood is closely associated with two water bodies (1) the mighty Columbia River—which enters the Northeast corner of the state from British Columbia and snakes through the eastern half of the state until it turns west as the border between Oregon and Washington and discharges at Washington's Southwest corner into the Pacific Ocean; and (2) Puget Sound—a large arm of the Pacific Ocean which flows on tidal cyclic basis deep into western Washington.

The total livability of the state is dependent primarily on the quantity and quality of these waters and their tributaries. Not only are they valuable for navigation, both commercial and recreational, but fish and wildlife use them for homes, food sources and resting areas. They are also of the greatest import for their scenic and aesthetic values. And, in the case of the Columbia, hydroelectric power production and agricultural irrigation uses are most important. It is fair to conclude that the environment of Washington State, including the essential character of its citizens, is determined largely by the condition of the Columbia River and Puget Sound and their associated waters.

The Commonwealth of Pennsylvania's posture, with respect to Lake Erie, the Delaware and Susquehanna Rivers and numerous other water bodies, is

not dissimilar from that of the State of Washington.

Recognizing the importance of its water resources, the government of the State of Washington has taken a number of very significant steps to protect these priceless resources. This has been especially true with regard to their quality.

Twenty-nine years ago, the Washington State Legislature enacted the state's basic water pollution control act. Chapter 216, Laws of 1945, now codified in Chapter 90.48 RCW. The Legislature has periodically reviewed this statute and added provisions to improve its effectiveness as a vehicle for water pollution abatement.[1] Of significance to this case are the provisions of Chapter 90.48 RCW which set forth clear policies of cooperation and coordination in the implementation of state and federal water pollution efforts in the State of Washington. RCW 90.48.153 and RCW 90.48.260.[2]

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[1]The major amendments to Chapter 90.48 RCW took place in 1955 (Chapter 71, Laws of 1955), 1967 (Chapter 13, Laws of 1967) and 1973 (Chapter 155, Laws of 1973).

The latest expression of general state water policy is contained in the Water Resources Act of 1971. Now codified in Chapter 90.54 RCW, RCW 90.54.020(3) sets forth a "fundamental" of management policy for the state's waters in these words:

> The quality of the natural environment shall be protected and, where possible, enhanced as follows:
>
> (b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

See RCW 90.52.040 also enacted in 1971.

[2]RCW 90.48.010, enacted in 1945 and amended in 1973, provides:

> It is declared to be the public policy of the State of Washington

The executive branch of Washington State government has also promoted effective federal-state coordination of the various efforts of government to eliminate water pollution in Washington. During 1971 and 1972 the Committee on Public Works of both the United States Senate and House of Representatives engaged in extensive and intensive examinations of the need for changes in the Federal Water Pollution Control Act. P.L. 92-500. The state's executive branch presented its views at various times during the course of these Congressional activities. The high point of the state's efforts to influence the development of this federal legislation was the per-

to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state. The state of Washington in recognition of the federal government's interest in the quality of the navigable waters of the United States, of which certain portions thereof are within the jurisdictional limits of this state, proclaims a public policy of working cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers to insure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington.

RCW 90.48.153, enacted in 1949, provides:

The commission is authorized to cooperate with the federal government and to accept grants of federal funds for carrying out the purposes of this chapter. The commission is empowered to make any application or report required by an agency of the federal government as an incident to receiving such grants.

RCW 90.48.260, enacted in 1967 and amended in 1973, provides:

The department of ecology is hereby designated as the State Water Pollution Control Agency for all purposes of the Federal Water Pollution Control Act as it now exists and is hereby authorized to participate fully in the programs of the act as well as to take all action necessary to secure to the state the benefits and to meet the requirements of the act . . .

sonal appearance of the state's governor, Daniel J. Evans, before the Committee on Public Works of the House of Representatives on December 7, 1971. On this occasion Governor Evans urged the committee to modify the FWPCA by:

(1) Setting forth goals of high quality for our nation's waters, including the elimination of water pollution by 1985;

(2) Establishing a strong regulatory program —the heart being a national waste discharge permit program coupled with appropriate civil and criminal sanction provisions;

(3) Providing a federal funding program to finance the construction of public sewerage abatement facilities;

(4) Creating a joint federal-state effort against water pollution which, rather than eliminating one government from the fight, encourages the utilization of the best talents of both federal and state governments.

The Commonwealth of Pennsylvania has followed a course of action within its legislative process which is not dissimilar to that taken by the state of Washington, in that the Commonwealth of Pennsylvania has statutorily recognized the need to purify and preserve its limited water resources. The Department of Environmental Resources has been given the power and duty to implement Pennsylvania's policy with regard to conserving and purifying Pennsylvania's water resources. Pennsyl-

vania's Department of Environmental Resources Act of December 3, 1970, P.L. 834, 71 P.S. § 510-1 et seq.

To insure that the State of Washington would be in a position of participating fully in the various programs contemplating federal-state cooperation in their implementation contained in the Federal Water Pollution Control Act Amendments of 1972, the legislature of the State of Washington in March, 1973, five months after enactment of the federal legislation, enacted Chapter 155, Laws of 1973. This legislation provided full authority for the executive branch of the State of Washington to participate in all of the federal-state programs of the new federal legislation.

In addition, anticipating receipt of the share of the federal funds authorized for allocation to the state of Washington for use in financing of public sewerage abatement and control facilities on a matching arrangement with state and local governments, the electorate of the State of Washington, at the general election of November, 1972, approved a referendum authorizing the sale of state general obligation bonds totaling $225,000,000 and the use of the proceeds in assisting in the financing of public water pollution control facilities and solid waste facilities. Chapter 127, Laws of 1972, 2nd Ex. Sess.

The total needs, in terms of dollars for water pollution control facilities by public entities in the

State of Washington, under both federal and state laws and as determined by the United States Environmental protection Agency, to meet the 1977 requirements of the Federal Water Pollution Control Act, is estimated to be $1,078,715,110.

Under the allocation formulas provided in Section 205 of the Federal Water Pollution Control Act as applied to funds authorized under Section 207 of the same act, the state of Washington is entitled to a total of $211,300,000 consisting of $44,500,000 for fiscal year 1973, $53,400,000 for fiscal year 1974, and $113,400,000 for fiscal year 1975. By regulations dated December 9, 1972, and January 15, 1974, the Administrator of the United States Environmental Protection Agency allotted to the state of Washington $17,800,000 for fiscal year 1973, $26,700,000 for fiscal year 1974, and $64,700,000 for fiscal year 1975.

Unless the full amount of federal funds is provided for use by public entities in Washington State, there is no reasonable possibility that the facilities required to be constructed by 1977 to meet federal and state water pollution control treatment and receiving water standards will be constructed. Further even if the full amounts are ultimately provided to the state of Washington, the 1977 requirements for water pollution control cannot be substantially achieved unless the funds Congress intended for allocation by the United States Environmental Protection Agency are provided to the state in such a

manner as to allow the commitment of funds and construction of facilities begun during fiscal year 1975.

The Commonwealth of Pennsylvania is presently holding approximately 530 applications by municipalities to secure funding of their water quality control programs under the Water Pollution Control Act Amendments of 1972. Almost all of these applicants have completed plans and specifications for their projects, with a total cost estimated at $1.5 billion and are generally ready to proceed to the construction stage. Twenty percent of the applications have been pending since February of 1972, 40% since February of 1973 and 40% since February of 1974. Sixty percent of the 530 projects are necessary for the municipalities to comply with anti-pollution orders, either of the courts or of the Department of Environmental Resources. Pennsylvania's allocation of unimpounded federal construction grants for fiscal years 1973, 1974 and 1975 is approximately $493.8 million, which will fund only 141 of the 530 qualified and needed projects. The remaining applications cannot be certified for funding until and unless the impounded funds are released.

Because of their deep concern over a serious malfunction in our nation's water pollution abatement effort, the State of Washington and the Commonwealth of Pennsylvania filed an action on January 21, 1974, requesting the United States District Court for the District of Columbia to issue an order

compelling the Administrator to allot the full sum Congress authorized to be appropriated for the construction of publically owned treatment works as provided in Sections 205 and 207 of the Act.[3] Since that time, some twenty-one additional states have successfully intervened in said action.[4] The combined interest of the plaintiffs and interveners in said suit represents approximately one-third of all of the impounded or unallotted funds for fiscal years 1973, 1974, and 1975.

STATEMENT OF THE CASE

The cases before this court have as their subject matter the issue of statutory construction to determine the extent of discretion, if any, granted to the Administrator of the United States Environmental Protection Agency (hereinafter the Administrator) in allotting funds among the states pursuant to the of Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500 (October 18, 1972), 86 Stat. 816, 33 U.S.C. 1251 *et seq.* (hereinafter the Act).

The facts are not in dispute. For preliminary purposes they are as follows: On October 4, 1972 the Congress passed a water pollution bill authorizing appropriations in the amount of $11,000,000,000 for waste treatment plant consruction grants for

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[3] *State of Washington et al. v. Russell E. Train*, Civil Action 74-105, United States District Court for the District of Columbia, filed January 21, 1974.

[4] Vermont, Illinois, Maryland, Colorado, Connecticut, Arizona, Idaho, Alabama, South Carolina, Iowa, Hawaii, Nevada, Oklahoma, North Dakota, Tennessee, New Jersey, Oregon, Utah, Georgia, Nebraska and Louisiana.

fiscal years 1973 and 1974. The bill was vetoed on October 17, 1972, by the President who stated that he found the measure to be of an "inflationary" nature. The next day Congress overrode the veto. On November 28, 1972, the Administrator announced that pursuant to the President's direction, he was allotting only $5,000,000,000 of the total $11,000,000,000 for treatment plant construction projects for fiscal years 1973 and 1974. It is the Administrator's announced action, which is popularly referred to under the rubric of "impoundment of funds", which is challenged in this suit. *Campaign Clean Water v. Ruckelshaus*, 361 F. Supp. 689, 5 E.R.C. 1441 (E.D. Va., 1973).

The Act begins by stating that its objective "is to restore and maintain the chemical, physical and biological integrity of the Nation's waters." Section 101(a). To achieve this objective, Congress declared as goals of the Act that "the discharge of pollutants into the navigable water be eliminated by 1985" and that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water to be achieved by July 1, 1983". Section 101(a)(1), (a). Congress unequivocally stated in the Act that "it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works." Section 101(a)(4).

Title II of the Act is entitled "Grants for Construction of Treatment Works". The purpose of this title is "to require and to assist the development and implementation of waste treatment plans and practices which will achieve the goals of this Act." Section 201(a). The Administrator "is authorized to make grants to any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works." Section 201 (g)(1). Congress "authorized to be appropriated to carry out this title, * * * for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000 for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000 and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000." Section 207.

The Administrator is required by the Act to allot among the States the sums authorized to be appropriated.

> Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, *shall be allotted* by the Administrator * * * Section 205(a) (Emphasis added.)

A state's share of the authorized amounts for fiscal year 1973 and 1974 is determined by a statutory formula based on "the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears on the estimated cost of construction of all needed publicly owned treatment works in all of the States." Section 205. Allotments to the States commencing in fiscal 1975 are

to be in accordance with revised cost estimates submitted to and approved by Congress. Section 205(a).

The designated shares are to be allotted among the States by the Administrator. These allotted funds then are available for grants to construct publicly owned treatment works within the State. Section 203. An individual applicant for a grant submits plans, specifications, and estimates for each proposed project to the Administrator for his approval. Approval of the plans, specifications, and estimates by the Administrator is deemed to constitute a contractual obligation of the United States for the payment of its proportional contribution to such project. Section 203(a).

The sums allotted to a State are to continue to be available for obligation for a period of one year after the close of the fiscal year for which such sums are authorized. The allotted sums that are not obligated after the one year extension are to be "immediately reallotted by the Administrator in accordance with regulations by him, generally on the basis of the ratio used in making the last allotment of sums under this section." Section 205(b)(1).

Prior to final approval of a treatment works project, the Administrator must consider the "limitations and conditions" of Section 204. For example, the Administrator is to determine that (a) the treatment works is in conformity with any applicable State plan under Section 303(e) of the Act, (b) such works have been certified by the appropriate State

water pollution control agency as entitled to priority over such other works in the State, (c) there are adequate provisions satisfactory to the Administrator for assuring proper and efficient operation and maintenance, and (d) the size and capacity of the works relate directly to the needs to be served by the works. Section 204(a)(2), (3), (4), (5).

The Federal share of the construction costs for approved projects is 75 per centum. Section 202(a). Expenditures of allotted funds are to be made by the Administrator in the form of payments to the recipient of a grant as the work progresses and costs of construction are incurred on the project. Section 203(b).

The case of *City of New York, et al. v. Train*, —— F.2d ——, 6 ERC 1177, 1179 (C.A.D.C. 1974) describes the funding procedures for publicly owned treatment works succinctly and accurately as follows:

> The Act was passed to insure that ultimate grantees could rely in advance on the amounts available. Section 101(a) declares that to clean the nation's waters "it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works." To this end, the Act created a funding mechanism known as "contract authority". The technical operation of the sections of the Act relating to this "contract authority" spending is at the heart of this dispute and a thorough understanding of the mechanism is, therefore, imperative.
>
> There are six distinct steps involved in funding under the Act. (1) Authorization by

> Congress to appropriate funds (§ 207); (2) "allotment" of these authorized sums among the various states, pursuant to formula (§ 205); (3) review by the Administrator of project proposals submitted by a particular municipality (§§ 203, 201(g)(2) and 204); (4) "obligation" by the Administrator of the federal share of an approved project (§§ 203 and 201(g)(1)); (5) appropriation by Congress of funds to pay obligated contracts as they fall due; and (6) disbursement of the funds (§ 203(b) and (c)).

The second step is the step in controversy.

STATEMENT OF THE ISSUES

This case pertains to the allocation of funds to the various states to finance publically owned waste treatment works pursuant to Sections 205 and 207 of the Federal Water Pollution Control Act Amendments of 1972.

The issues before this court are:

(1). Whether the Administrator of the United States Environmental Protection Agency may ignore Congressional intent and the mandatory requirements of the Federal Water Pollution Control Act Amendments of 1972 by refusing to allot the full sums authorized to be appropriated by Congress.

(2). Whether the Administrator of the United States Environmental Protection Agency may exercise discretion based upon his judgmental evaluation of competing national policies, priorities, goals and objectives rather than those established by Congress under the Federal Water Pollution Control Act Amendments of 1972.

ARGUMENT—THE ADMINISTRATION OF THE ENVIRONMENTAL PROTECTION AGENCY MUST ALLOT UNDER SECTION 205(a) OF THE FEDERAL WATER POLLUTION CONTROL ACT NO LESS THAN THE FULL AMOUNT AUTHORIZED TO BE APPROPRIATED BY SECTION 207 OF THE ACT.

The Administrator has no discretion under the Act to determine the amounts to allot among the States. The Act contains mandatory language that the $5 billion and $6 billion for fiscal years 1973 and 1974, respectively "shall be allotted by the Administrator". Congress intended the full sums authorized to be appropriated to be allotted among the States. This intention is manifested in the Act as a whole and its legislative history.

If the Administrator fails to allot among the States the authorized funds, they are irretrievably lost to the States. Under Section 205(b)(1) only the sums allotted to a State continue to be available for obligation beyond the end of the fiscal year for which the sums have been authorized.

> *Any sums allotted* to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. *Such sums* shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which *such sums* are authorized * * * (Emphasis added.)

The words "such sums" refer back to "any sums allotted".

Section 205(b)(1) further provides that any

funds allotted but not obligated are to be immediately reallotted by the Administrator.

> Any *amounts so allotted* which are not obligated by the end of such one-year period *shall be* immediately *reallotted* by the Administrator * * * Such reallotted sums shall be added to the last allotments made to the states * * * (Emphasis added.)

The obvious intent of these latter provisions is to keep the money available to the States for construction projects. The Administrator has no authority under the Act to reallot funds once the end of the fiscal year is past.

The Administrator's refusal to allot frustrates the entire reallotment process. States have absolutely no opportunity to submit projects for approval and consequent obligation of the unallotted funds. Under full allotment all of the authorized funds continue to be available for obligation.[5]

The plain meaning of the language of Sections 205 and 207 is to require the Administrator to allot the full sums authorized. Section 205 provides that "[s]ums authorized to be appropriated pursuant to section 207 * * * *shall be allotted* by the Administrator * * *" The sums authorized to be appropriated under Section 207 are "to carry out" the provisions of Title II regarding grants for construction of publicly owned treatment works. The

[5]In order to prevent the possible lapse of fiscal year 1973 funds, the Plaintiff and successful interveners/Plaintiffs in *State of Washington, et al., v. Train*, Civil Action 74-105, filed on January 21, 1974 in the District Court for the District of Columbia, succeeded on June 28, 1974 in obtaining a temporary restraining order to prevent the possible lapse of $1,044,600,000.

words "not to exceed" before the authorized amounts in Section 207 establish the upper limit on the obligation of funds (not the allotment of funds) by the Administrator.

The clear intent of Congress by a reading of these sections is to require the full allotment of the authorized funds. The Court in *City of New York et al. v. Ruckelshaus*, 358 F. Supp. 669, 679 (D.D.C. 1973) succinctly stated that:

> The language of the pertinent sections of the Act, read in the light of their legislative history, *clearly indicates the intent of Congress to require the Administrator to allot, at the appropriate times, the full sums authorized to be appropriated by § 207.* Hence, this court has no choice other than to declare that § 205(a) of the Act requires the Administrator to allot among the states $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974. (Emphasis added.)

The overriding intent of Congress was to commit the Federal government to a program by providing the statutory scheme and the financial means to accomplish the task envisioned in the Act. The pertinent language of the Act and its legisaltive history clearly indicate that the Administrator must allot the *full* sums authorized to be appropriated by Section 207 of the Act.

At the time the Act was being considered, Congressman Harsha was the ranking minority member of the House Public Works Committee, which reported on the House version of the Act. He was also

the floor manager of the bill and a member of the conference committee. Congressman Harsha explained to the House the meaning of certain of his amendments to the Act.

> * * * I want to point out that the elimination of the word "all" before the word "sums" in Section 205(a) and insertion of the phrase "not to exceed" in Section 297 was intended by the managers of the bill to emphasize the President's flexibility *to control the rate of spending.* 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972) (Emphasis added.)

At a later point of the debate, a colloquy between Congressmen Jones, Ford and Harsha revealed the actual intent of the amendments.

> MR. GERALD R. FORD. Mr. Speaker. I think it is vitally important that the intent and purpose of Section 207 is spelled out in the legislative history here in the discussion on this conference report.
>
> As I understand the comments of the gentleman from Ohio [Harshal], the inclusion of the words in Section 207 in three instances of "not to exceed" indicates that is a limitation. More importantly, that it is not a mandatory requirement that in one year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure*?
>
> MR. HARSHA. I do not see how reasonable minds could come to any other conclusion than that the *language means we can obligate or expend up to that sum*—anything up to that sum but not to exceed that amount * * *
>
> MR. GERALD FORD. Mr. Speaker. I would like to ask the distinguished chairman of the subcommittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio [Harsha].
>
> MR. JONES of Alabama. My answer is "yes". Not only do I agree with him, but the gentleman from Ohio offered this amendment which we have now under discussion in the committtee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio [Harsha].
>
> MR. GERALD R. FORD. Mr. Speaker. This clarified and certainly ought to wipe out any doubts anyone has. The language is not a mandatory requirement for *full obligation and expenditure* up to the authorization figure in each of the three fiscal years * * * 118 Cong. Rec. H. 9123 (Daily ed. Oct. 4, 1972) (Emphasis added.)

From the above exchange, it is clear that any discretion of the Administrator regarding the authorized funds was intended to be exercised only at the *obligation and expenditure stage and not at the allotment stage.*

Congressman Harsha noted the recent impoundments of highway funds (*after allotment*) by the executive branch.

> [T]he Committee on Public Works is acutely aware that moneys from the highway trust fund have been impounded by the Executive. Expenditures from the highway trust fund are made in accordance with similar contract authority provisions to those in this bill. Obviously, *expenditures and appropriations* in the water pollution control bill could also be controlled. However, there is even more flexibility in this water pollution control bill because we have

added "not to exceed" in Section 207, as I indicated before.

Surely, if the Administration can impound moneys from the highway trust fund which does not have the flexibility of the language of the water pollution control bill, it can just as *rightly control expenditures from the contract authority produced in this legislation by that same means.* 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972) Emphasis added.)

However, the court in the *New York* case, *supra*, at 678 pointed out:

> * * * The impoundments of Federal-Aid Highway Act moneys referred to by Congressman Harsha were of funds allotted, i.e., *the controls were being exercised at the obligation level rather than at the allotment level.* (Emphasis added.)

Significantly, the very highway impoundments referred to by Congressman Harsha were declared to be illegal by the court in *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (9th Cir., 1973). Furthermore, Congressman Harsha followed his impoundment comments by noting that the Administrator may exercise discretion at a later point in time solely as it related to approval of plans, specifications and estimates.

> * * * I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications and estimates. *This is the pacing item in the expenditures of funds. It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures.* 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972) (Emphasis added.)

On the Senate side, the main spokesman for the Act was Senator Edmund Muskie. Senator Muskie at that time was Chairman of the Senate Subcommittee on Air and Water Pollution, which reported out the Senate version of the Act. He was also a floor manager of the bill and a member of the conference committee. Senator Muskie, in a specific reference to the amendments proposed by Congressman Harsha, made it clear to the Senate that the meaning of the Act is as contended herein

> Under the amendments proposed by Congressman William Harsha and others, the *authorizations for obligational authority* are "not to exceed" $18 billion over the next 3 years. Also "all" sums authorized to be obligated *need not be committed, though they must be allocated.* These two provisions were suggested to give the administration *some flexibility concerning the obligation of construction grant funds.* 118 Cong. Rec S 16871 (Daily ed. Oct. 4, 1972) (Emphasis added.)

The President also understood that Congress intended the full allotment of funds for in his veto message he stated:

> Certain provisions of * * * [the bill] confer a measure of *spending discretion and flexibility* upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.
>
> But the law would still exact an unfair and unnecessary price from the public. For I am convinced * * * that the pressure for full funding this bill would be so intense that funds approaching the *maximum authorized* amount could ultimately be claimed and paid out, no

matter what technical controls the bill appears to grant the Executive. 118 Cong. Rec. H. 10266 (Daily ed. Oct. 18, 1972) (Emphasis added.)

It is significant that the President, in *vetoing* the bill, actually assumed an interpretation of the Act contrary to that subsequently taken in impounding the funds. The President initially assumed the existence of discretion only at the *spending* level; however, after the veto was overridden the President assumed the right to impound at the earlier stage of *allotment*. The fact that the President originally interpreted the Act in the same manner as is herein contended, constitutes a compelling argument against the subsequent, contrary interpretation taken by the President. Presumably, the President concluded that he would be under pressure to spend more than he wanted to unless be impounded at the allotment stage. The President and the Administrator are therefore seeking to do indirectly what the President originally recognized he could not be directly.

Congressman Harsha emphasized the need for advance planning and assured availability of funds in these words:

> Because of the magnitude of this program, it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants, including the sale of bonds that they have to sometimes negotiate.
>
> Now, *this can only be accomplished it there is assured availability of Federal grant funds for future years.* This necessary assurance is

> not provided by merely advancing appropriations for 1 year. That will not meet the needed assurance of long-term planning. This is a continuing program.
>
> The construction of a waste treatment plant consists of planning; economic and engineering feasibility studies; preliminary engitions, and estimates; the acquisition of land where appropriate, and the actual physical construction of the building itself. Under this legislation each one of these steps is ordinarily a separae project, a separate contract, and it is funded as completed or as work progresses. This is not the case under existing law where 25 percent of the total project must be completed before any payment can be made.
>
> At the time any one of these preliminary steps is taken, such as the plans, specifications, and estimates, there is no assurance that appropriated funds would be available for subsequent projects for land acquisition and the actual building of this plant for which the plans, specifications, and estimates are being prepaerd. This, therefore, makes the orderly continuous planning and scheduling of work impossible. 118 Cong. Rec. H. 2727, H. 2728 (Daily ed. Mar. 29, 1972) (Emphasis added.)

Senator Muskie presented similar prevailing arguments in the Senate.*

As noted by the court in the *New York City* case, *supra*, at 674:

> The seriousness of the planning problem was understood by Congress. It was one of the reasons for utilizing the device of allotment, thereby making funds available for obligation [by contract authority], in lieu of the ordinary appropriations procedure.

---

*117 Cong. Rec. S. 17445 (Daily ed. Nov. 2, 1971).

It does not make sense to assume that Congress established the allotment and contract authority funding mechanism to correct the vagaries of the annual appropriation process, and coincidently grant the Administrator discretion to undercut its commitment by reintroducing the uncertainties of the old system back into the process. The intended firm commitment of Congress vanishes with any exercise of discretion by the Administrator *at the allotment stage*. Thus if the funding provisions are to have any meaning at all, it must be concluded that Congress did not intend the sums authorized for allotment to be altered at the whim of the Administrator.

Senator Muskie asked the Senate the following crucial questions regarding the high costs of attaining clean water and then gave the following answers:

> Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make possible life on this planet? Can we afford life itself? Those questions were never asked as we destroyed the waters of our nation, and they deserve no answers as we finally move to restore and renew them. These questions answer themselves. And those who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this crisis.
>
> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the Federal Government in 75% grants to municipalities during fiscal years 1973-75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation. 118 Cong. Rec. S. 16870 (Daily ed. Oct. 4, 1972.)

When the language of Sections 205 and 207 are analyzed in context of the whole Act and its legislative history, the inevitable conclusion is that the Administrator must allot the full sums authorized by Congress. It is inconceivable that Congress intended to grant the Administrator unfettered discretion at the allotment stage which in effect makes the Act a series of empty promises.

Even if the Administrator had any discretion, which he did not, he nonetheless has abused whatever discretion he may have possessed by his refusal to allot over one-half of the funds authorized by Congress to construct publicly owned treatment works. The broad objection of the Act, its goals, policies, effluent limitation deadlines, enforcement provisions, have been completely ignored by the Administrator.

The position of the amici curiae is further supported with compelling effect by a memorandum authorized by Justice William Rehnquist when he was serving as an Assistant Attorney General in the Office of Legal Counsel of the Department of Justice. The memorandum was addressed to the Deputy Counsel to the President and concerned the President's authority to impound funds appropriated for aid to federally impacted schools. It reads in part as follows:

> With respect to the suggestion that the

President has a *constitutional power to decline to spend* appropriated funds, *we must conclude that existence of such a broad power is supported by neither reason nor precedent.* There is, of course, no question that an appropriation act permits but does not require the executive branch to spend funds. (See 42 Ops. A.G. No. 32, p. 4 (1967)). *But this is basically a rule of construction,* and does not meet the question whether the President *has authority to refuse to spend where* the appropriation act *or the substantive legislation, fairly construed, require such action.*

Although there is no judicial precedent squarely in point, *Kendall v. United States,* 12 Pet. 524 (1838), appears to be authority against the Presidential power. In that case it was held that mandamus lay to compel the Postmaster General to pay to a contractor an award which had been arrived at in accordance with a procedure directed by Congress for settling the case. [T]he mere fact that a duty may be described as discretionary does not, in our view, make the principle of the *Kendall* case inapplicable, if the action of the federal officer is beyond the bounds of discretion permitted him by the law. 119 Cong. Rec. S 3808 (Daily ed. March 1, 1973 (Emphasis added.)

CONCLUSION

From the foregoing, the amici curiae contend there is no statutory basis or justification for the Administrator to thwart the declared priorities and policies of Congress provided in the Federal Water Pollution Control Act Amendments of 1972. The amici curiae therefore request this court declare invalid the Administrator's action in refusing to allot the full amount of the authorized funds to the states to implement the construction grant program of the 1972 Act.

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Supreme Court, U. S.
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In the Supreme Court of the United States

October Term 1973

Nos. 73-1377 and 73-1378

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, ET AL.,

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

v.

CAMPAIGN CLEAN WATER, INC.,

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia and the Fourth Circuits

BRIEF OF THE CENTER FOR GOVERNMENTAL RESPONSIBILITY AS AMICUS CURIAE IN SUPPORT OF THE CITY OF NEW YORK

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Center for Governmental Responsibility files this brief as amicus curiae under rule 42 (2) with the consent of both Respondents and Petitioner.

The Center is a privately funded non-partisan, non-profit organization housed at the University of Florida College of Law committed to the goal of promoting the accountability of government officials and institutions to the public. Its interest in this case emanates from its detailed study of the impoundment controversy and its effort to implement its scholarly conclusions. The year and one-half study was conducted by the Center's predecessor, the McIntosh Foundation Executive Impoundment Project,* whose summary findings have been reproduced at 119 CONG. REC. S21120 (daily ed. Nov. 27, 1973). The Center has continued the study of the impoundment issue to date. The study has produced, among other things, two law review articles: Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191 (1974); Levinson & Mills, *Budget Reform and Impoundment Control*, 27 VAND. L. REV. 618 (1974). Further, the Center has acted as amicus curiae on the issue in the instant case in three courts: *Minnesota v. Train*, No. 73-1446 (8th Cir., argued Feb. 13, 1974); *Texas v. Train*, No. 73-3965 (5th Cir., argued Apr. 29, 1974); and *Florida v. Train*, No. 73-156 (N.D. Fla. Feb. 25, 1974), *appeal argued*, Civil No. 73-3965, 5th Cir., Apr. 29, 1974. The Center's special interest is in the legal development and resolution of federal impoundment issues.

*This project is further described in *Joint Hearings on S.373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 22 (1973).

In the Supreme Court of the United States

October Term, 1973
Nos. 73-1377 and 73-1378

RUSSELL E. TRAIN, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Petitioner

v.

THE CITY OF NEW YORK
ON BEHALF OF ITSELF AND
ALL OTHER SIMILARLY
SITUATED MUNICIPALITIES WITHIN
THE STATE OF NEW YORK, ET AL.,

RUSSELL E. TRAIN, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Petitioner

v.

CAMPAIGN CLEAN WATER, INC.,

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia and the Fourth Circuits

**BRIEF OF THE CENTER
FOR GOVERNMENTAL RESPONSIBILITY
AS AMICUS CURIAE
IN SUPPORT OF
THE CITY OF NEW YORK**

STATEMENT OF THE FACTS

In 1972, Congress passed the most extensive program for cleaning the nation's waters in history. The Federal Water Pollution Control Act Amendments of 1972 [hereinafter cited as the "Water Pollution Control Act" or the "Act"] established as a national goal the achievement of clean waters in America by 1985. Congressional hearings on the proposed legislation were extensive. The bill passed the Senate by a vote of 74 to 0 and the House by 336 to 11.

On October 17, 1972, the President vetoed the bill because of what he termed "inflationary considerations." Congress considered the veto message and overwhelmingly overrode the veto. In the House, the vote was 247 to 23; in the Senate, 52 to 12.

Subsequently, on November 22, 1972, President Nixon ordered the Administrator of the Environmental Protection Agency not to allot the full amount provided in the final bill. Nixon ordered allotment of two billion dollars in fiscal year 1973 and three billion dollars in fiscal 1974. The amounts established in the bill were five billion dollars for fiscal 1973 and six billion dollars for fiscal 1974. The result was a cutback of fifty-five percent of the funding provided by Congress.

SUMMARY OF ARGUMENT

The principal question posited by the instant case is whether the Administrator of the Environmental Protection Agency has discretion to refuse to allot the full amounts authorized by the Water Pollution Control Act. The statutory history and the overall structure of the statute demonstrate that the allotment provision is mandatory. There is no statement in legislative history stating that allotment is discretionary, while one of the principal sponsors of the bill directly stated that allotment is mandatory. Spending discretion exists, but at the obligation phase rather than at allotment. Additionally, the overall scheme of the statute demonstrates the desire of Congress to provide long range planning certainty to achieve total restoration of the nation's waters by 1985. This purpose is best accomplished through a mandatory allotment schedule coupled with some discretion in the obligation phase. There is a substantial negative impact on long range state planning when there is an exercise of discretion at allotment as distinguished from exercise of discretion at obligation. While the statute will operate well with mandatory allotment, insertion of discretionary allotment would cause illogical results. Refusal to allot in full will cause permanet loss of funds for obligation.

At whatever stage of the funding process, refusal to allot or expend fifty-five percent of the Water Pollution Control Act funds would be an abuse of discretion. Congress intended to provide funding for the solution of water pollution problems which would be available to the states. Fifty-five percent impoundment, substantially curtailing implementation of the program, is beyond the discretion of the Administrator. Further, justifications given as the basis for the refusal to allot were improper reasons outside the realm of relevant considerations; therefore, any exercise of discretion on this basis is improper.

Actions by the Administrator were not only outside his statutory authority but also beyond his constitutional authority. Neither the "faithfully execute" clause nor "inherent authority" support executive action in refusing to allot. Cases considering constitutional authority of the executive branch have consistently held it to be limited when impinging upon the intent of Congress, especially in the domestic area. Further, the refusal to allot after a veto of the Act had been overriden operated as an unconstitutional absolute veto.

Sovereign immunity is no bar to the suit against the Administrator; first, because of the well established exception of "officer suit" and, second, because the Administrative Procedure Act waives sovereign immunity. Similarly, political question is no bar to justiciability in the instant case since clear standards exist for judicial review and there is no absolute commitment to a coordinate branch of the absolute power to spend or not to spend.

In sum, there is no bar to judicial review of the action of the Administrator in refusing to allot. Further, these actions were in contravention of the explicit provisions and purposes of the Act and the Constitution.

ARGUMENT

I. THE PLAIN MEANING AND LEGISLATIVE HISTORY OF THE ALLOTMENT PROVISIONS OF THE WATER POLLUTION CONTROL ACT, TOGETHER WITH THE OVERALL STRUCTURE OF THE ACT, DEMONSTRATE THAT THE ADMINISTRATOR HAS NO DISCRETION TO REFUSE TO ALLOT.

The issue in the instant case is the meaning of the allotment phase of the Water Pollution Control Act -- not the academic issue of the mandatory or permissive nature of appropriations generally.[1] The precise question before the Court is whether the allotment provision is mandatory and requires the Administrator to allot the full sums authorized by Congress. To determine whether an action within the funding process is mandatory, it is imperative to analyze not only that particular provision, but all relevant

[1] For discussion of the general issue, *see* Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 214 (1974). No generalization can be made about the mandatory nature of various phases of the spending process. There must however be reference to the particular budgetary provision with the other relevant provisions of the appropriations act. In fact, President Nixon, in vetoing an HEW-OEO appropriation, recognized the possible effect of statutory language:

> [N]early nine tenths of these increases are for mandatory programs which leave the executive branch no discretion whatever as to the level or the purpose of the added expenditures.

PUBLIC PAPERS OF THE PRESIDENT, *State of the Union Address*, Jan. 27, 1970, at 22.

portions of the funding process of that statute.[2] When the allotment phase is read as mandatory, the expenditure scheme of the Act is logical and internally consistent. Further, mandatory allotment best implements the goals of the Act. In contrast,if the allotment provision is read as discretionary, the funding procedure becomes speculative and the Act is effectively crippled.

This is not to say the Administrator has no discretion in the implementation of the Act. In fact, discretion is apparently accorded at the obligation phase. However, the plain meaning and the history of the relevant provisions show that the allotment phase is mandatory.

A. THE HISTORY AND PLAIN MEANING OF THE AUTHORIZATION AND ALLOTMENT PROVISIONS (SECTION 205 AND SECTION 207) SHOW THAT ALLOTMENT IS MANDATORY.

The sums authorized to be appropriated must be fully allotted as specified by Congress in sections 205 and 207:

> §205--Sums authorized to be appropriated pursuant to section 207...shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized....
>
> §207--There is authorized to be appropriated to carry out this title...for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

[2] In the instant case, it should be noted that the Act reverses the normal budgetary procedure whereby sums are appropriated by Congress and later obligated and expended by an executive agency (see Appendix). In the Act, funds are first authorized under section 205 to be appropriated later to carry out the purposes of the Act. The Administrator is then required under section 205 to *allot* the authorized contract authority among the states. Once allotted, the sums become available to the states for *obligation*. The Administrator then reviews grant applications submitted by states and municipalities to determine if they satisfy statutory and regulatory criteria. If approved, a contractual obligation arises and, upon project completion, an appropriation liquidates the obligation.

I. THE PLAIN MEANING OF THE ALLOTMENT PROVISION REQUIRES ALLOTMENT OF THE FULL SUMS LISTED IN SECTION 207.

Initially, it should be recognized that "shall allot" is an intrinsically mandatory phrase. *See Boyden v. Comm'r of Patents*, 441 F.2d 1041, 1043 & n.3 (D.C. Cir.), *cert. denied*, 404 U.S. 842 (1971); *Stanfield v. Swenson*, 381 F.2d 755, 757 (8th Cir. 1967). It is therefore mandatory that, under section 205 (a), the Administrator allot sums authorized to be appropriated in section 207. The sums authorized to be appropriated in section 207 are five and six billion dollars. No other sums are mentioned. The plain meaning of the language, therefore, is that the Administrator must allot the amount authorized to be appropriated.

Since sections 205 and 207 are plainly expressive of a mandatory allotment, resort to legislative history is unnecessary. Interpretation of the funding provisions of the Act should remain within its four corners, giving due weight to the plain meaning, internal logic and goals of the Act's provisions. Use of extrinsic evidence must be predicated upon a finding that a statute is ambiguous or that its plain meaning leads to absurd or futile results. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892). The fact that the Administrator *claims* that there is an ambiguity is not conclusive. The Administrator offers legislative history in support of its assertion that the construction of the statute is doubtful. Extrinsic evidence, however, must be used "to *solve*, but not to *create* an ambiguity."

United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932); *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899). When considered by itself, the Act is clear in declaring that the Administrator *shall allot* the amounts specified.

It must also be recognized that the "not to exceed" language in section 207 does not modify the clear meaning of "shall allot" as has been argued by the Administrator. *See* Brief for Petitioner at 15. The Administrator argues that "not to exceed" shows that the sums mentioned are only ceilings which reflect an intent to allow obligation of lesser amounts. However, section 205 is designed to mandate allotment and to specify the date for allotment while section 207, where the phrase "not to exceed" appears, is designed to specify the year of availability and the maximum sums authorized to be appropriated. Perhaps there might be warrant for imposing "not to exceed" on section 205 if there were no other explanation for its existence in the Act, *cf. Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819), but there is another explanation.

The phrase operates as a limit on appropriations (a limit on the Congress)[3] and a ceiling on the authority of the Administrator to obligate funds. The phrase means "no more than." Further, "not to exceed" paces expenditure. Section 207 utilizes "not to exceed" three different times as a ceiling on amounts which may be spent in each year so as to pace expenditure of the total of 18 billion dollars. If in fact Congress were actually attempting to utilize "not to exceed" to be expressive of discretionary allotment it could

[3] In a discussion of an act with an "authorization to appropriation" mechanism similar to that in the instant case, a district court stated that authorization provisions appeared to be a limitation on Congress, rather than on the Administrator, to prevent appropriation of more funds than those authorized for a given program. Guadamuz v. Ash, 368 F. Supp. 1233, 1239-40 (D.D.C. 1973).

have done so explicitly. The clause could have read "authorized to be allotted and appropriated not to exceed . . . ."[4]

When considered in and of itself, the Act is clear in declaring that the Administrator shall allot the amounts specified. There is no need to resort to legislative history although that history also supports the mandatory nature of allotment.

2. THE LEGISLATIVE HISTORY OF SECTIONS 205 AND 207 SUPPORTS THE CONCLUSION THAT WHILE THERE IS DISCRETION WITHIN THE ACT TO CONTROL OBLIGATIONS, THERE IS NO DISCRETION AT THE ALLOTMENT PHASE.

The focus of the statutory controversy in the instant case is the interpretation of the inclusion or omission of three words and phrases within sections 205 and 207 during the enactment of the Water Pollution Control Act:

(1) deletion of "all" in section 205 (a) by the conference committee:

> [All] sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator . . . .

(2) addition of "not to exceed" before the sums specified in section 207:

> There is authorized to be appropriated to carry out this title, other than §§208 and 209, for the fiscal year ending June 30, 1973, [not to exceed] $5,000,000,000,

[4] "The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." Iselin v. United States, 270 U.S. 245, 250-51 (1925).

for the fiscal year ending June 30, 1973, [not to exceed] $6,000,000,000 .....

(3) the words "shall be allotted" in section 205.

The deletion of "all" in conference is asserted to be an indication that Congress intended to allow discretion in the allotment phase. However, nowhere in the conference report or any legislative history is there a direct statement to that effect. The Administrator relies strongly on a statement by Representative Harsha:

> I want to point out that the elimination of the word "all" before the word "sums" in section 205 (a) and insertion of the phrase "not to exceed" in section 207 was intended...to emphasize the President's flexibility to control the *rate of spending*.

118 CONG. REC. H9122 (daily ed. Oct. 4, 1972) (emphasis added). The key to understanding the statement, however, comes when Representative Harsha further explicates:

> Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. *This is the pacing item* in the expenditures [*sic*] of funds.

Id. (emphasis added).

The screening procedure and project approval which Representative Harsha has identified as the pacing item to control the rate of expenditures is the obligation phase. Representative Harsha clearly specifies that it is *this* phase (obligation) of the funding process where he finds the discretion to control the *rate* of spending. Moreover, Congressman Harsha continues: "It is clearly the understanding of the managers that under these circumstances [the application

review procedure] the Executive can control the *rate of expenditures*." *Id.* (emphasis added). The comments of Representative Harsha make clear that the statement primarily cited as making allotment discretionary actually refers to "obligation." Nowhere in these comments is there reference to "flexibility" in allotment or to allotment as a "pacing item." Further, because of the different phases in the Act, control over allotment does not so much affect the *rate* of spending as it does the *amount* of spending,[5] further indicating that the reference to discretion relates to obligation.

A colloquy between former Representative Ford and Representative Harsha further supports the interpretation that discretion was granted only at the obligation phase:

> As I understand the comments of [Representative Harsha], the inclusion of the words in section 207 in three instances of "not to exceed" indicates that it is a limitation. More importantly that it is not a mandatory requirement that in 1 year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*

Id. at H9123 (emphasis added). Representative Harsha responded:

> I do not see how reasonable minds could come to any other conclusion than that the language means *we can obligate or expend up to that sum -- anything up to that sum but not to exceed that amount.*

Id. (emphasis added).

[5] Allotment relates only to the amount a state may obligate. Obligation may occur at various times during the year after administrative review of applications, thereby pacing the rate of expenditure. *See* p.28-29,32 *infra*.

It is clear that, if what Representative Harsha says is accurate, namely that anything up to the maximum sum can be obligated or expended, then discretion at the allotment phase is virtually impossible. That is, if the Administrator exercises *any* discretionary reduction at the allotment phase, then what Representative Harsha proclaims as possible becomes impossible.[6]

The legislative history is totally devoid of any statement that discretion exists at the allotment phase to withhold funds. In fact, as explained above, the statements advanced by the Administrator as indicating a discretionary allotment do not even refer to the allotment phase. Instead, the legislative history is replete with direct statements referring to discretion at the obligation phase. This pattern of legislative history, tending to place discretion at obligation rather than allotment, is further strengthened by a categorical statement in the legislative history by a principal sponsor of the bill which directly applied to sections 205 and 207 and explains their effect:

> Under the amendments proposed by Congressman William Harsha and others, the authorizations for *obligational authority* are "*not to exceed*" $18 billion over the next 3 years. Also, "all" sums authorized to be obligated need not be committed, though *they must be allocated*.[7] These two provisions were submitted to give the administration some flexibility concerning the *obligation* of construction grant funds.

[6] Allotment necessarily precedes obligation. If allotment is discretionary, then the Administrator *cannot* possibly obligate up to the maximum sum, unless he exercises his discretion to allot the full amount. If allotment is mandatory, then Congressman Harsha's statement is correct and the Administrator can obligate up to the full amount. There is ample history supportive of making full amounts available for obligation. *See* footnote 15, and accompanying text *infra*.

[7] The Senate bill had used the term "allocate" rather than allotment. H.R. REP. NO. 1465, 92d Cong., 2d Sess. 113 (1972). *See* New York v. Train, 494 F.2d 1033, 1043 n.19 (D.C. Cir. 1974).

118 CONG. REC. S18546 (daily ed. Oct. 17, 1972) (remarks of Senator Muskie) (emphasis added). This statement by Senator Muskie, Senate sponsor of the Act, in no way conflicts with the statements of Representatives Harsha and Ford. The statement does, however, provide a critical clarification. Rather that merely alluding to where discretion is vested, Senator Muskie clearly states when discretion is *not* vested.

The deletion of the word "all" from section 205 has been given undue weight. The provision has essentially the same meaning with or without "all." Moreover, this Court has stated that statutes must be interpreted on "the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952). The act of deleting the word "all" should be accorded no particular significance if the meaning of the provision is not affected by the omission. "All sums" is equal to "sums" albeit less emphatic.[8]

[8] It is a general principle of English grammar that when there is the absence of a qualifying adjective, the noun is considered a totality. *See* P. ROBERTS, MODERN GRAMMAR 29 (1968). An illustration of the significance that Congress apparently gives to the term "all" is found in the legislative history of the old Senate Bill. Section 205 of that bill read, "*all allocations* to the states under Section 205 are to be made on the basis of population" (emphasis added). The commentary by the committee explaining this section reads as follows: "This section provides that *sums appropriated* or authorized to be obligated for the construction of treatment works under Title II, will be allocated among the states on the basis of population alone" (emphasis added). Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 1448 (1973). The significance of this passage is the absence of "all" before "sums" in the commentary, indicating a tendency in Congress not to use an adjective in this context, and probably for no particular reason -- whether that adjective be "some," "all" or "the."

billion figure and correctly found it to be a clear expression of Congressional will.

> We find that it was Congress' intention that that full $18 billion be spent to control water pollution.

494 F.2d at 1042.

This conclusion should also be reached by this Court. If the full amount is not allotted, as the law requires, the needs and goals of this Nation to clean up its waters will not be met. Subsequent estimates now unfortunately demonstrate that the Congressional estimate itself was short.[5] Congress certainly did not intend that the development of a shortgage would justify a reduction in allotment.

D. The Allotment Scheme Was Established to Aid the States in Planning to Meet Statutory Requirements.

In the developmental stages of the Act amendments were proposed in both houses of Congress to strike the contractual obligation authority which binds the United States to pay its proportional share upon approval of a project by the Administrator. The traditional method of funding has been the opposite: to reimburse the grantee through the annual appropriations process. The experience of Congress with the old method was that it did not work as intended and that the requirements of the Act necessitated a firm commitment that could be relied on by potential grantees for long range planning purposes. Congressman Jim Wright, a member of the House Public Works Committee and later a conferee, in debating the issue on the floor of the House, made the following points which emerged as the prevailing view in the House:

[5] The Administrator's report to Congress indicates total national needs of $61.5 billion, of which $60.1 is eligible for federal grant participation. "Report to Congress—Costs of Construction of Publicly-Owned Wastewater Treatment Works—1973 'Needs' Survey."

> The bill requires that by 1976 every publicly owned plant in the Nation must provide at least secondary treatment, and that by 1981 it must employ as a minimum "the best practicable technology."[6]
>
> The bill promises that the Federal Government will contribute its pro rata share of the cost.
>
> But what good is that requirement, and what good is that promise, if we do not absolutely intend to deliver upon our part of the bargain?
>
> Why should advance obligational authority be necessary? The events of the last few years suggest the answer.
>
> The authorization for fiscal 1969 was $700 million, but the appropriation was only $214 million—less than one-third—and the amount actually spent was only $134 million.
>
> For the 4 years, 1968 through 1971, the shortfall of appropriations below the amounts held out in the authorization bill totaled approximately $1.2 billion. And because of periodic administrative freezes on construction grants, the shortfall in the amounts actually granted came to approximately $1.6 billion.
>
> . . . .
>
> Mr. Chairman, many municipalities, faced with truly critical water pollution problems and intent on solving those problems in a timely fashion notwithstanding the failure of the Federal Government to live up to its part of the bargain, went ahead on their own and built the plants.
>
> Obviously it would not be our intention to penalize those communities for having demonstrated the

[6] The dates were changed in the final version of the Act to 1977 and 1983 respectively.

initiative and determination to move ahead. And so this bill authorized more than $2 billion to reimburse them for that portion of the authorized Federal share that was withheld from them.

But other communities waited, because they were unsure of the strength of the congressional commitment. And because they waited, the cost both to them and to the Federal Government is considerably greater today than it would have been had they been encouraged to proceed 4 years ago.

So this is the acid test. *We decide right now just how serious we are about cleaning up the streams of this country.* Do we mean it, or do we not? Are we certain, or are we uncertain?

I for one am certain. I believe that most of the Members are. I am ready to make that commitment. I think the Public Works Committee is certain, and the majority of the House is certain. *We can prove it by voting down this amendment and saying to the communities of this Nation that once they put their hands to the plow, they need not turn back.*

(Emphasis added.) 118 Cong. Rec. H. 2726 (Daily ed. Mar. 29, 1972).

Congressman Harsha emphasized the need for advance planning and assured availability of funds.

> Because of the magnitude of this program, it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants, including the sale of bonds that they have to sometimes negotiate.

> Now, *this can only be accomplished if there is assured availability of Federal grant funds for future years.* This necessary assurance is not provided by merely advancing appropriations for 1 year. That will not meet the needed assurance of long-term planning. This is a continuing program.
>
> The construction of a waste treatment plant consists of planning; economic and engineering feasibility studies; preliminary engineering for the preparation of plans, specifications, and estimates; the acquisition of land where appropriate, and the actual physical construction of the building itself. Under this legislation each one of these steps is ordinarily a separate project, a separate contract, and it is funded as completed or as work progresses. This is not the case under existing law where 25 percent of the total project must be completed before any payment can be made.
>
> At the time any one of these preliminary steps is taken, such as the plans, specifications, and estimates, there is no assurance that appropriated funds would be available for subsequent projects for land acquisition and the actual building of this plant for which the plans, specifications, and estimates are being prepared. This, therefore, makes the orderly continuous planning and scheduling of work impossible.

(Emphasis added.) 118 Cong. Rec. H. 2727, H. 2728 (Daily ed. March 29, 1972).

Senator Muskie presented similar prevailing arguments in the Senate.

Mr. President, in this bill we have undertaken to do something that we have never done before on a problem with such long-range impact as this. We have set deadlines that must be met by industry, and presumably by all polluters, including governmental polluters. We have set a deadline in 1976 and we have set a deadline in 1981; and finally we set the goal of no discharges of pollutants into any waterways by 1985.[7]

There is only one way to meet deadlines like that, and that is to make a total commitment now. If we indicate in any way any reservations about our commitment as a government and as a Congress to the achievement of those goals in the point of view of the public sector, what we have done is undermine the credibility of our determination to insist on that goal and its achievement by the private sector.

To achieve the deadlines we are talking about in this bill—I think all of us in the committee are proud of it, and we are committed to it—*we are going to need the strongest kind of evidence of the Federal Government's commitment to pick up its share of the load.* We cannot budge, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill. The municipalities, through the Conference of Mayors, have estimated at the request of the committee that the initial investment required is $30 to $35 billion. The authorization we have provided in this bill of $14 billion[8] for 4 years

[7] The dates were changed in the final version of the Act to 1977, 1983, and 1985 respectively.

[8] This was changed to $18 billion in the final version of the Act.

> to meet the Federal share is a hard, conservative figure. All we are saying in asking the Senate to approve contract authority is a commitment now to that $14 billion. If we have any hesitation about that commitment, then we will eliminate the contract authority and keep our options open.

(Emphasis added.) 117 Cong. Rec. S. 17445 (Daily ed. Nov. 2, 1971).

As noted by the District Court in *City of New York v. Ruckelshaus, supra,* 674 F. Supp. at 674:

> The seriousness of the planning problem was understood by Congress. It was one of the reasons for utilizing the device of allotment, thereby making funds available for obligation [by contract authority], in lieu of the ordinary appropriations procedure.

It strains credulity to assume that Congress established the allotment and contract authority funding mechanism to correct the vagaries of the annual appropriation process, and coincidently granted the Administrator discretion to undercut its commitment by reintroducing the uncertainties of the old system back into the process. The firm commitment of Congress vanishes with any exercise of discretion by the Administrator *at the allotment stage.* If the funding provisions are to have any meaning at all, it can only be concluded that Congress did not intend the sums authorized for allotment to be altered at the whim of the Administrator.

II. THE ADMINISTRATOR HAS NO DISCRETION TO REDUCE ALLOTMENTS.

A. The Act Requires Full Allotment.

The Administrator contends that he has discretionary authority to allot less than the full amounts authorized to be appropriated. The basis for this contention rests entirely on amendments that were agreed to by the House and Senate Conferees considering the bill. The phrase "not to exceed" was placed before the sums specified in Section 207 and the word "all" was deleted before the phrase "[s]ums authorized to be appropriated" in Section 205.[9] The Administrator's position is untenable.

The overriding intent of Congress was to commit the Federal government to a program assuring financial means to accomplish the tasks envisioned in the Act. The pertinent language of the Act and its legislative history, as outlined in Part

[9] The two amendments in question were to Sections 205 and 207 of the Act, as shown below (bracketed material deleted, italicized material added):

ALLOTMENT

Section 205. (a) [All] sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediate preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments. . . .

AUTHORIZATION

Sec. 207. There is authorized to be appropriated to carry out this title . . . for the fiscal year ending June 30, 1973, *not to exceed* $5,000,000,000, for the fiscal year ending June 30, 1974, *not to exceed* $6,000,000,000 and for fiscal year ending June 30, 1975, *not to exceed* $7,000,000,000.

The "not to exceed" language was an amendment only to the House version of S.2770; the words already appeared in the comparable section of the Senate bill.

I of this *amicus* brief, clearly indicate that the Administrator must allot the *full* sums authorized to be appropriated by Section 207. Indeed, it is only by full allotment that there could *even be control over the* rate of spending at subsequent stages.

The Amendments relied on by the Administrator were sponsored by Congressman William H. Harsha of Ohio.[10] At the time the Act was being considered, Congressman Harsha was the ranking minority member of the House Public Works Committee, which reported on the House version of the Act. He was also the floor manager of the bill and a member of the conference committee. Congressman Harsha explained to the House the meaning of his amendments.

> . . . I want to point out that the elimination of the word "all" before the word "sums" in Section 205 (a) and insertion of the phrase "not to exceed" in Section 207 was intended by the managers of the bill to *emphasize* the President's flexibility *to control the rate of spending.*

(Emphasis added.) 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972).

Significantly, Congressman Harsha was merely emphasizing what the Act already provided: namely, full allotment and deferred spending. At a later point of the debate, a colloquy between Congressmen Jones, Ford and Harsha revealed the intent of the amendments.

> **Mr. Gerald R. Ford.** Mr. Speaker. I think it is vitally important that the intent and purpose of Section 207 is spelled out in the legislative history here in the discussion of this conference report.

[10] The District Court in *The City of New York v. Train, supra,* noted that the views of sponsors of the legislation at issue are of particular importance when reviewing its legislative history. 358 F.Supp. at 677.

As I understand the comments of the gentleman from Ohio [Harsha], the inclusion of the words in Section 207 in three instances of "not to exceed" indicates that is a limitation. More importantly, that it is not a mandatory requirement that in one year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*

Mr. Harsha. I do not see how reasonable minds could come to any other conclusion that *the language means we can obligate or expend up to that sum*—anything up to that sum but not to exceed that amount . . . .

Mr. Gerald R. Ford. Mr. Speaker. I would like to ask the distinguished chairman of the subcommittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio [Harsha].

Mr. Jones of Alabama. My answer is "yes." Not only do I agree with him, but the gentleman from Ohio offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio [Harsha].

Mr. Gerald R. Ford. Mr. Speaker. This clarifies and certainly ought to wipe away any doubts anyone has. The language is not a mandatory requirement for *full obligation and expenditure* up to the authorization figure in each of the three fiscal years. . . .

(Emphasis added.) 118 Cong. Rec. H. 9123 (Daily ed. Oct. 4, 1972).

This history necessarily reflects the understanding of the Congress that there *must be* full allotment, for only by such full allotment could it be possible for subsequent expenditures to be made *up to* the authorization figure. From the above exchange it is clear that any discretion of the Administrator regarding the authorized funds was intended to be exercised only through the mechanism of *obligation and expenditure at later stages, and not through the allotment process.*

Congressman Harsha further noted that even in the exercise of discretion by the Administrator at a later point in time such discretion related *solely* to approval of plans, specifications and estimates.

> . . . I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications and estimates. *This is the pacing item in the expenditures of funds. It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures.*

(Emphasis added.) 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972).[11]

Congressman Harsha explained the impact of the Act's funding provisions in terms of expenditures in future fiscal

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[11] Congressman Harsha reiterated his comments on the floor of the House after the President's veto. 118 Cong. Rec. H.10268 (Daily ed. Oct. 18, 1972). Congressman Harsha cited as support for the existence of flexibility the fact that impoundments by the executive branch of highway funds. 118 Cong. Rec. H.9122 (Daily ed. Oct. 4, 1972). The District Court in *The City of New York v. Ruckelshaus, supra,* 678 F.Supp. at 678, pointed out:

> . . . The impoundments of Federal-Aid Highway Act moneys referred to by Congressman Harsha were of funds allotted, i.e., *the controls were being exercised at the obligation level rather than at the allotment level.*

(Emphasis added.) Significantly, the very highway impoundments referred to by Congressman Harsha were declared to be illegal by the Court in *State Highway Commission of Missouri v. Volpe,* 479 F.2d 1099 (8th Cir., 1973).

years. In so doing, he demonstrated that it was his understanding that Sections 205 and 207 required *allotment of the full amount* of the sums specified in Section 207.

> [T]he first major impact of obligations from the $5 billion authorizations for the fiscal year ending June 30, 1973, is in fiscal year 1975 . . . .
>
> As a matter of fact, for fiscal year 1973 if *all the money were obligated and placed under contract, there would only be $20 million needed to meet the obligations.*

(Emphasis added.) 118 Cong. Rec. H. 10268 (Daily ed. Oct. 18, 1972).

Unquestionably, when Congressman Harsha spoke hypothetically of the *obligation* of the entire $5 billion, he necessarily expressed his recognition that the entire $5 billion had to be available by allotment for obligation. His statement was intended to *emphasize* to the House that the President's fear about "budget-wrecking" was unwarranted in view of the fact that there would be an inherent lag between the time when funds were *obligated* and the time when they would actually be *spent*.

Thus, the pacing of expenditures is built into the funding mechanism, but such pacing is itself dependent upon full allotment as an absolute prerequisite. Senator Muskie made the same point to the Senate when he noted that the full $18 billion authorized by the Act probably would not be spent until the end of fiscal year 1979.[12] Senator Muskie at the time was

[12] Senator Muskie introduced into the record a table indicating the impact of the $18 billion on the budget. It was estimated that due to the extended period of time needed for construction that actual expenditure under full obligation would be the following percentages of the sums authorized to be appropriated: for the first year, 5 percent; the second year, 20 percent; the third year, 30 percent; the fourth year, 40 percent; and for the fifth year, 5 percent. 118 Cong. Rec. S. 18547 (Daily ed. Oct. 17, 1972).

Chairman of the Senate Subcommittee on Air and Water Pollution, which reported out the Senate version of the Act. He was a floor manager of the bill and a member of the conference committee. Senator Muskie, in a specific reference to the amendments proposed by Congressman Harsha, made it clear to the Senate that the meaning of the Act is as contended by the State of Minnesota and the City of New York herein.

> Under the amendments proposed by Congressman William Harsha and others, the *authorizations for obligational authority* are "not to exceed" $18 billion over the next 3 years. Also "all" sums authorized to be obligated *need not be committed, though they must be allocated.* These two provisions were suggested to give the administration some *flexibility concerning the obligation of construction grant funds.*

(Emphasis added.) 118 Cong. Rec. S. 16871 (Daily ed. Oct. 4, 1972.[13]

Incredibly, the Administrator points to the legislative history and incredulously contends that Congressman Harsha, Senator Muskie and others, when explaining their understanding of the amendments, and in their use of such descriptive terms as "the obligation of construction grant funds," "the expenditure of funds," "controlling the rate of spending," and the "pacing item in the expenditure of funds," did not thereby intend to distinguish between the allotment stage, and the obligation and expenditure stages, of the statutory scheme. The Administrator's contention is based upon a palpable misconstruction of the Act's allotment provisions and constitutes a misrepresentation of the legislative history.

[13] Senator Muskie reiterated his comments on the floor of the Senate after the President's veto. 118 Cong. Rec. S.18546, S.18549 (Daily ed. Oct. 17, 1972).

B. If the Administrator Has Any Discretion at the Allotment Stage, He Has Abused It.

1. Discretion was not exercised within the bounds delineated by the Act.

The Administrator's discretion involves solely approval or disapproval of projects based upon criteria set forth in the Act. The Administrator has abused this limited discretion by his refusal to allot over one half (55 percent) of funds authorized by Congress to construct publicly owned treatment works. The objectives of the Act, its goals, policies, effluent limitation deadlines, and enforcement provisions have been ignored by the Administrator. He has made no effort to justify his action other than by reference to the President's evaluation of competing national priorities, regardless of the declared intent of Congress as stated by law.

The Administrator may not arrogate such legislative power to himself. Congress alone enacts the law. Congress established bounds within which the Administrator is *required* to work in exercising any limited discretion he may have. These bounds are delineated by the clear language of the Act. The Administrator may not look beyond these bounds for supporting rationale to reduce the allotment of funds. If his decision had been based on the needs and problems of sewage treatment facilities construction, it might have been on more solid ground. However, a decision based on totally unrelated considerations is contrary to law. This principle was firmly established in a case analogous to those before the Court, i.e., *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1114 (8th Cir., 1973). The issue before the court in *Volpe* was whether the Secretary of Transportation may defer authority to obligate highway funds previously apportioned to the State or

Missouri under the Federal-Aid Highway Act of 1956 when the reasons given for deferment by the Secretary were the status of the economy and the need to control inflationary pressures. The funding scheme in the Highway Act is that principally adopted by Congress in the Act under consideration. The rationale of the *Volpe* case is irrefutable and should be recognized by this Court.

> To reason that there is implicit authority within the Act to defer approval [of projects] for reasons totally collateral and remote to the Act itself requires a strained construction which we refuse to make. It is impossible to find from these specific grants of authority discretion in the Secretary to withhold approval on projects Congress has specifically directed *because of a system of priorities the Executive chooses to impose on all expenditures.* The Congressional intent is that the Secretary may exercise his discretion to insure that the roads are well constructed and safely built at the lowest possible cost, all in furtherance of the Act, but *when the impoundment of funds impedes the orderly progress of the federal highway program, this can hardly be said to be favorable to such a program.* In fact, it is in derogation of it. It is difficult to perceive that Congress intended such a result.

(Emphasis added.) 478 F.2d at 1114. See also *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689 (E.D. Va. 1973); *Local 2677, American Federation of Government Employees v. Phillips*, 358 F. Supp. 60 (D.D.C., 1973).

The rationale of *Volpe, supra*, bears forceful application to the present case. The Congressional intent as manifested in the Act here absolutely requires the Administrator to pro-

vide federal financial assistance for construction of publicly owned sewage treatment works. The Administrator was given discretion only to insure that the facilities are well designed and constructed for efficient operation and are capable of meeting the needs of the people in the areas to be served at the lowest possible cost. The Administrator's unlawful action here has the effect of disapproving numerous projects without proper review under the limitations and conditions of Section 204, thereby subverting the legislative objective.

Judge Miles Lord, in considering *State of Minnesota v. Fri, supra*, followed the rationale of *Volpe, supra*. He correctly noted:

> Nothing in the Act gives the Administrator the authority to consider matters outside the corners of the Act itself. In failing to allot all of the money authorized in this matter, the Administrator is acting in express violation of the Act itself as well as in violation of the purposes of the Act as set forth by Congress. Furthermore, to the extent the Administrator has some discretion in this matter, the refusal to allot nearly half of the funds authorized *for reasons not related to the Act and its stated purposes* marks a clear abuse of such discretion.

(Emphasis added.) Slip Op. at 14.

The Administrator cannot be allowed to exercise discretion as though the Act did not exist. The Act alone must be the basis for any exercise of discretion by the Administrator.

2. The refusal to allot 55% of the funds authorized is a flagrant abuse of discretion because it effectively frustrates the intent of Congress as embodied in the Act.

The action of the Administrator drastically reduced the States capacity to carry out the purposes of the Act to fund the construction of sewage treatment facilities for the abatement of pollution of the waters of the State. The present Minnesota allotment is $121 million short of full allotment for the two fiscal years in question.[14] The Minnesota Pollution Control Agency, the agency administering the federal grant program, had pending 140 grant applications to upgrade or construct publicly owned treatment works for fiscal year 1973. These applications represented an estimated total construction cost of $212 million. If 75 percent federal funding were available, this would amount to $160 million. Consequently, the needs of Minnesota outstripped the Administrator's allotted amount for fiscal 1973 alone by a minimum of $119 million. Under the Administrator's allotment only 13 of the 140 applicants of the MPCA would be fully funded and one or two others stood to be partially funded. The total number of grant applicants for fiscal 1974 is approximately 200. This figure includes a carry-over of those projects from fiscal 1973 which were not funded. The Administrator's allotment allows funding of only five additional projects in fiscal 1974.[15]

Minnesota's case is not an isolated example. Its experience is duplicated in many, if not all States, with the result that thousands of plant construction projects have gone unfunded. Many more will go unfunded in the upcoming fiscal

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[14] Allotment Regulation, 37 Fed. Reg. 26282 (1972).

[15] These facts were presented by affidavits in *State of Minnesota v. Fri, supra*, and were not disputed by the Administrator.

years as the needs of the States go unmet. These monies will not be forthcoming unless allotted as required by law. The program initiated by the Act has effectively ground to a halt, frustrating the express intentions of the Congress.[16]

Furthermore, the intricate statutory scheme is so interrelated that the action of the Administrator has set off a domino-like chain reaction. Not only are projects halted now but municipalities are discouraged from proceeding with construction plans on their own. EPA regulations prohibit the awarding of any grant if initiation of the project construction has occurred, 38 Fed. Reg. 5330, §35.903(d) (1973). The inevitable result is that no eligible applicant or grantee will proceed with construction until the Administrator approves its project and thereby legally guarantees 75 percent federal funding. The Act holds out a generous "carrot" which no potential recipient can, as a practical matter, refuse. Consequently, no construction or upgrading of publicly owned treatment works in Minnesota and other States will be initiated until federal grants are made available for obligation by the Administrator.

The resulting total paralysis of the program is an intolerable situation for potential grantees. They are faced with statutory deadlines to meet specific effluent limitations. All publicly owned treatment works in existence on July 1, 1977, are required to have effluent limitations based on a minimum of secondary treatment. More stringent standards may be applicable to public treatment works by July 1, 1977, if necessary to meet water quality standards established pursuant to

[16] This Court should not be misled by Table I, Petitioner's Brief, p. 49, showing that many States have not fully obligated the reduced allotments. Minnesota has numerous project applications pending approval by the Administrator. Indeed Table I more correctly indicates the grant program is floundering because of the Administrator's failure to make a full commitment of the funds.

State law or regulation. Section 301(b)(1)(B) and (C). This means that all publicly owned treatment works presently have less than three years to be in compliance with Federal and State laws and regulations. Construction of major projects can easily take three or four years. Those treatment works that fail to meet the effluent standards face a civil penalty of up to $10,000 per day of violation. Section 309(d). Any citizen adversely affected by a violation of an effluent standard may initiate legal action. The remedies available by a citizen suit could include appropriate civil penalties under Section 309(d) of the Act. Section 505(a)(1) and (2). As a result, without the allotment of the impounded funds, many communities, particularly smaller ones, will simply be unable to comply with the effluent standards and will thereby be subject to enormous penalties.

Congress could not have intended for its purposes to be so effectively emasculated by the action of one official at one stage of the statutory scheme. The Administrator suggests that he has the authority and will eventually allot the full amount of the authorized funds, and thus there is no adverse effect on the States. This assumes that there is legal merit to the Administrator's interpretation of Sections 205 and 207, an interpretation which must be rejected as a spurious afterthought.

When Sections 205 and 207 are analyzed in the context of the whole Act and its legislative history, the inevitable conclusion is that the Administrator must allot the full sums authorized by Congress. It is inconceivable that Congress intended to grant the Administrator unfettered discretion at the allotment stage and thereby make the Act a series of empty promises.

Failure to allot over half of the sums authorized for fiscal year 1973 and 1974 was a clear abuse of discretion.

3. The President and the Administrator cannot do indirectly what the President was forbidden by Congress to do by veto.

When the Act was first passed by Congress the President exercised his veto power over it. At that time he understood that Congress intended the full allotment of funds. In his veto message he stated:

> Certain provisions of . . . [the] bill confer a measure of *spending discretion and flexibility* upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.
>
> But the law would still exact an unfair and unnecessary price from the public. For I am convinced . . . that the pressure for full funding under this bill would be so intense that funds approaching the *maximum authorized* amount could ultimately be claimed and paid out, no matter what technical controls the bill appears to grant the Executive.

(Emphasis added.) 118 Cong. Rec. H. 10266 (Daily ed. October 18, 1972).

The President recognized that the Act *required* the use of the funds for the purposes appropriated and vetoed it for that reason. Congress overrode this veto, reaffirming its strong commitment to the program.

It is significant that the President, in *vetoing* the bill, actually assumed an interpretation of the Act contrary to that subsequently taken in impounding the funds. The President initially assumed the existence of discretion only at the *spending* level. However, after the veto was overridden the President assumed the right to impound at the earlier stage of *allotment*. The fact that the President originally interpreted the Act in the same manner as that contended by the Respondents constitutes a compelling argument against the subsequent contrary interpretation taken by the President through the Administrator. Presumably, the President concluded that he would be under pressure to spend more than he desired unless he impounded at the allotment stage. The President and the Administrator cannot do indirectly what the President originally recognized he could not do directly.

Where the Executive Branch is mandated by Congress to expend funds for a well-defined program containing specific time tables set up to reach the desired goal, it is the *duty* of the Executive to execute that law. The Executive may not decline to execute it.

The position of the State of Minnesota is further supported with compelling effect by a memorandum authored by Justice William Rehnquist when he was serving as an Assistant Attorney General in the Office of Legal Counsel of the Department of Justice. The memorandum was addressed to the Deputy Counsel to the President and concerned the President's authority to impound funds appropriated for aid to federally impacted schools. It reads in part as follows:

> With respect to the suggestion that the President has a *constitutional power to decline to spend* appropriated funds, *we must conclude that existence of such a broad power is supported by neither reason nor precedent.* There is, of course, no question that an appropriation act permits but does not require the executive branch to spend funds. See 42 Ops. A.G. No. 32, p. 4 (1967). *But this is basically a rule of construction,* and does not meet the question whether the President *has authority to refuse to spend where*

> the appropriation act or *the substantive legislation, fairly construed, require such action.*
>
> . . . .
>
> It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and *it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them.*

(Emphasis added.) The Rehnquist memorandum is reprinted at 119 Cong. Rec. S. 3808 (Daily ed. March 1, 1973).

The principle that an administrative official may be compelled to expend money mandated to be spent was established long ago in *Kendall v. United States*, 12 Pet. 524 (1838), where it was held that mandamus law to compel the Postmaster General to pay to a contractor an award which had been arrived at in accordance with a procedure directed by Congress for settling the case. Here the Executive Branch should thus be compelled to act within the bounds defined by the law by allotting the monies needed to implement the comprehensive program to attain clean water.

III. THE ACTION OF THE ADMINISTRATOR IS NOT SO "COMMITTED TO AGENCY DISCRETION" AS TO BE NONREVIEWABLE.

The Administrator contends that his refusal to allot 55% is nonreviewable because it comes within the admittedly "very narrow" exception of the Administrative Procedure Act, 5 U.S.C. §701 (Supp. V) making actions "committed to agency discretion by law" not subject to review. This contention has no merit, for the exception is limited to cases where the statute is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). In this case there is abundant statutory language governing the bounds of the Administrator's actions. Once these limits are exceeded the action is reviewable. It is clearly the business of the judicial branch to determine the limits of statutory grants of authority. Justice Reed in *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944), placed the issue in proper perspective.

> When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justifiable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. *Cf. United States v. Morgan*, 307 U.S. 183, 190-91.

> This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by exertion of unauthorized administrative power.

In determining whether the Administrator's action is inconsistent with the Act, this Court should follow the basic canon of construction observed in *Richards v. United States:*

> We believe it fundamental that a section of statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpretating legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy."

369 U.S. 1, 11-12 (1962).

The provisions of the Act provide the appropriate standards. A court by analysis of the Act can easily determine that the latitude of the questioned discretion is not as broad as the Administrator mistakenly asserts. The standards for review are found in the purposes and policies of the Act, its objectives and goals, its project review provisions, its time limits and its effluent limitations. As Judge Russel stated in *Campaign Clean Water v. Train,* 489 F.2d 492, 498 (1973).

> [T]he executive . . . has the constitutional duty to execute the law in accordance with the legislative purpose so expressed. When the executive exercises its responsibility under appropriate legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review.

The Act does not confer upon the Administrator or his agency the discretion to deny allotment of funds using any other standards but those provided in the Act. The Administrator is asking the Court to recognize discretion that totally disregards the Act and thereby negates the existence of *any* law applicable to him. The Administrator's contention is untenable.

CONCLUSION

The State of Minnesota respectfully requests that the Court hold that the Administrator is mandated by the Act to allot to the States the full amount of sums authorized by Congress for the construction of publicly owned sewage treatment facilities. In the alternative, the Court should hold that the action of the Administrator constituted an abuse of discretion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1377

RUSSELL E. TRAIN, as Administrator of the United States Environmental Protection Agency,

Petitioner,

vs.

THE CITY OF NEW YORK, on behalf of itself and all other similarly situated municipalities within the State of New York, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF NEW JERSEY

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AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF NEW JERSEY

Interest of the *Amicus*

The State of New Jersey is filing an *amicus curiae* brief in this matter because of the vital importance the

Court's ruling will have on New Jersey's efforts to combat water pollution,[1] and because an examination of the Administrator's refusal to allot the full sums authorized by Congress for New Jersey will aid in understanding the harmful impact of said refusal upon achieving the national goals set forth in the Federal Water Pollution Control Act Amendments of 1972. This brief does not attempt to set forth a full length argument for affirmance of the court of appeal's ruling since those arguments have already been set forth in the brief of respondent, City of New York.

The first section of the Act, 33 U.S.C. § 1251(a), declares that its basic objective is to restore and maintain the chemical, physical and biological integrity of the nation's waters and to achieve a goal of zero water pollution by 1985. To achieve that fundamental purpose the Act sets forth a timetable for controlling and curing various sources and degrees of pollution. In particular, section 301 of the Act, 33 U.S.C. § 1311 provides that secondary sewage treatment standards shall be met by July 1, 1977, and that the best available technology shall be employed by July 1, 1983. Various civil and criminal penalties are provided by section 309, 33 U.S.C. § 1319, for those who fail to meet the pollution control standards.

[1] New Jersey's efforts to combat water pollution include two legal challenges to the Administrator's refusal to allot the full sums authorized by Congress. *New Jersey* v. *Train*, D.N.J. Civ. No. 74-932 (Filed June 21, 1974) and *State of Washington* v. *Train*, D.D.C. Civ. No. 74-105 (filed January 21, 1974). In the New Jersey case a preliminary injunction was issued on June 27, 1974, ordering the Administrator to make a full allotment to New Jersey for FY 1974 so as to guard against the possible lapse of said funds. New Jersey, along with 19 other states, intervened in the State of Washington case on June 28, 1974, in order to gain the protection of an order issued on that date guarding against the possible lapse of FY 1973 funds.

The first section of the Act also declares that it is national policy that federal financial assistance shall be provided to construct the publicly owned waste treatment works needed to meet the above described water pollution control goals. 33 U.S.C. § 1251(a)(4). Congress took a bold step in fulfilling that national policy by authorizing the appropriation of $18 billion for construction grants in section 207 of the Act. 33 U.S.C. § 1287. Pursuant to section 205(a), 33 U.S.C. § 1285(a), Congress imposed upon the Administrator of the Act the duty of alloting among the states their appropriate shares of the funds authorized.

However, the Administrator, acting at the direction of the President, has refused to allot the full amounts provided by section 205(a). Instead, the Administrator has allotted only one half of the $18 billion authorized for the fiscal years 1973 through 1975. In particular, on December 7, 1972 the Administrator allotted only 2 of the 4 billion authorized for FY 1973 and 3 of the 6 billion authorized for FY 1974. 37 Fed. Reg. 26282, § 35.910-1(a) (1972). Later, on January 9, 1974, the Administrator allotted 4 of the 7 billion authorized for FY 1975. 39 Fed. Reg. 1847, § 35.910-4(a) (1974). The net result to New Jersey of the Administrator's actions is that the State has only had available to it $639.9 million instead of some $1.3 billion which would be available if the full authorizations had been allotted.[2]

The actions of the Administrator in refusing to allot the full amounts have had and will continue to have a se-

[2] The actual allotments to New Jersey for the fiscal years 1973-1975 have been $154,080,000; $231,120,000; and $254,656,200, for a total of $639,856,200. *See*, 39 Fed. Reg., *supra*. Multiplying the total sums authorized by Congress in section 207 of the Act by the appropriate allotment percentages for New Jersey yields $1,300,823,000, as the full sum authorized for the State.

verely damaging impact on New Jersey's ability to meet the pollution control goals of the Act. According to the U. S. Environmental Protection Agency's 1973 Needs Survey, it will cost approximately $1.5 billion to meet the 1977 secondary waste treatment standards in New Jersey. *See,* Environmental Protection Agency, Costs of Construction of Publicly Owned Waste Water Treatment Works: 1973 Needs Survey, Table II, p. 12. Thus New Jersey would have to spend almost all of its potential full allotment of federal funds to meet the interim 1977 standards alone.[3] Since the Administrator has only allotted $639.9 million to New Jersey, the State will have to spend at least an additional $818 million of its own funds to meet the 1977 standards, an amount far in excess of the 25% share that Congress intended the states to expend on waste treatment facility construction. *See,* section 202(a) of the Act, 33 U.S.C. § 1282(a).

The 1973 Needs Survey also indicates that it will cost a total of almost $3.4 billion to meet the overall goals of the Act in New Jersey. Obviously, even full allotment of the funds authorized by Congress would not provide New Jersey with 75% federal funding for overall compliance with the Act. However, the full allotment of $1.3 billion would more than double the federal aid presently available to New Jersey to meet the staggering financial burdens of water pollution control.

Aside from the direct adverse monetary impact on water pollution control efforts, the incomplete allotments by the

[3] Assuming a cost of $1,458 million as indicated in the 1973 Needs Survey, then the federal share of 75% would come to almost $1,094 million of the total $1,301 million authorized by Congress for New Jersey. New Jersey would thus be left with only $207 million to meet the other even more costly requirements of the Act.

Administrator have been the cause of various secondary impediments. For example, planning has been rendered more difficult and less certain because state and local officials have not been able to anticipate the amounts that would be available, in spite of the Act's clear authorization of $18 billion, but rather have had to await the result of the Administrator's so far unbridled discretion in deciding how much to allot. Thus, New Jersey officials did not know for sure until January 9, 1974, how much money would be allotted out of the FY 1975 authorization. The possibility, timing and amount of future allotments remains totally speculative, precluding effective planning for its use. In addition, the delay in construction of needed waste treatment plants which is an inevitable result of the partial allotments will cause the overall cost of pollution control to rise because of inflation. It is an inescapable fact of present day economics that a treatment plant built at some date in the future will cost more than one built today.

Although the possibility of future allotments is factually and legally speculative, the above discussion demonstrates that New Jersey's need for the funds is definite; moreover, New Jersey's ability to plan for the rapid obligation and expenditure of the money is also definite. In spite of the relative newness of the present water pollution control grant program, New Jersey has already obligated 100% of its 1973 allotment and is well on its way toward obligating its 1974 and 1975 allotments. See Table I, Petitioner's Brief, p. 49.

Although the above table in petitioner's brief indicates that New Jersey had only obligated some $65 million of its 1974 allotment of $231 million by May 31, 1974, as of August 6, 1974 New Jersey has obligated a total of $124

million or 54% of its 1974 allotment. It is anticipated that New Jersey will obligate its entire 1974 allotment by the end of this year. Table I also indicates that New Jersey had obligated some $5.9 million of its FY 1975 allotment by May 31, 1974. However, as of August 6, 1974 that total has reached almost $20 million out of a total 1975 allotment of $254.6 million.[4] Based upon the best projections available at present, it is anticipated that New Jersey will completely obligate its FY 1975 allotment by the end of the present fiscal year, and that the State will be in a position to obligate the impounded portion of FY 1975 money within the additional year allowed by section 205(b)(1). 33 U.S. C. §1285(b)1.

ARGUMENT

Administrative discretion over the allotment of funds is inconsistent with Congress' intent to assure the states that $18 billion in federal aid will be available and thus jeopardizes the achievement of the water pollution control goals set forth in the Federal Water Pollution Control Act Amendments of 1972.

The Federal Water Pollution Control Act Amendments of 1972 specify an unusual scheme for funding the grant in aid program to states and municipalities for the construction of publicly owned sewage treatment facilities. That funding scheme, known as "contract authority", follows a three step process. First, pursuant to section 207, 33 U.S.C. § 1287, Congress authorized the appropriation of not to exceed $18 billion for construction grants. The funds are then made available to individual states under section 205 of the Act, 33 U.S.C. § 1285, after allotment according to ratios based on the various states' needs. The second stage of contract authority funding involves the approval of particular construction projects. Under section 203, 33 U.S.C. § 1283, once a project is approved, it becomes a contractual obligation of the United States for the payment of its proportional share. The final stage of contract authority is the payment of contractual obligations with funds that are subsequently appropriated for that purpose.

Because the approval of a project is deemed a contractual obligation of the United States, the recipients of a grant promise are assured of its ultimate payment. Contract authority is thus the method by which Congress has chosen to bind the federal government to the payment of funds that are authorized for the water pollution control program. This form of funding was selected by Congress over the normal authorization and appropriation route because of the strongly recognized need to assure those who would plan and construct sewage treatment facilities that the money promised would actually be made available. Earlier funding programs not involving contract authority had revealed serious flaws in that there was often a gap between what Congress promised through authorization bills and actually delivered through appropriation measures. *See,* Federal Water Pollution Control Act Amendments of 1971, S. Rep. 92-414, 92nd Cong., 1st Sess. 35 (1971). Therefore, in the 1972 Act Congress recognized the gravity of the nation's water pollution problem, and selected contract authority funding as the most appropriate means of tackling the momen-

[4] Section 205(b)(1), 33 U.S.C. §1285(b)(1), provides in part that any sums alloted shall be available for obligation on and after the date of allotment. Under said authority almost $20 million in FY 1975 money has been obligated to cover increased costs incurred on already approved projects and on initial planning grants, even though FY 1974 money has not yet been exhausted.

tous planning and building process that would be required to clean up the nation's waters by the dates specified. *See,* 33 U.S.C. § 1251.

Even though Congress evidenced a clear intent to provide for stable, long term funding under the Act, the legislative history, as fully discussed in both the petitioner's and respondents' briefs, also indicates an intent by Congress to allow the Administrator some discretion over the rate of spending under the Act. Unfortunately, the Administrator, acting at presidential direction, has selected a mode of exercising this discretion that is at fundamental odds with Congress' intent in providing for contract authority and which jeopardizes the achievement of the water pollution control goals set by the Act. The Administrator has chosen to exercise whatever discretion he possesses to control spending by refusing to allot the full amounts authorized by Congress. Thus, while section 207 of the Act, 33 U.S.C. § 1287, authorized the appropriation of $5 billion for fiscal 1973, $6 billion for fiscal 1974, and $7 billion for fiscal 1975, the Administrator only allotted $2, $3, and $4 billion for those years respectively.

Since only funds that have been allotted are available for obligation, 33 U.S.C. § 1285(b)(1), the Administrator's actions mean that only one half of the funds authorized by Congress to combat water pollution is presently available for contract authority funding. The other $9 billion is as unavailable for construction grants as if Congress had never authorized its appropriation.

The Administrator argues that the other $9 billion has not been lost, and that it can be made available through the process of supplemental allotments (Pet. Br. pp. 24-29). Whether or not this is true, and the fear of lapsed funds proves to be unfounded, is besides the point, since

the concept of partial initial allotments followed by possible supplemental allotments flies in the face of the commitment and assurances of stable funding that Congress intended to make by authorizing the expenditure of $18 billion through the contract authority method. Discretion at the allotment stage reintroduces into the funding process the exact same evils that Congress sought to avoid by using the contract authority method of funding. Until more funds are actually allotted, New Jersey officials have no accurate way of knowing how many more construction projects can be planned for use of federal aid, and as previously stated, New Jersey has used all of its FY 1973 allotment and is well on its way to exhausting both FY 1974 and 1975 funds. Thus, to the extent that funds have been withheld, contract authority funding is just as uncertain as the previous method—instead of waiting for uncertain congressional appropriations, state and local officials must now wait for the Administrator to exercise his dubious discretion in making new allotments.

The choice by the Administrator is all the more unfortunate because there is an alternative method of exercising discretion over federal spending under the Act. Instead of refusing to allot the full sums authorized, the Administrator could control the rate at which the allotted funds are obligated on projects. This latter means of control does not carry with it the uncertainty inherent in reduced allotments, because full allotment assures that the entire $18 billion in funds will be available under section 205(b)(1), 33 U.S.C. §1285(b)(1), until used. Although obligational control means that approval may be delayed, it does not cast doubt on the fact that the full amount will be available for eventual expenditure. There is a substantial difference in being given a vague expectation that unspecified sums may be allotted at unspecified

future dates, and knowing that $18 billion is definitely available, although its rate of expenditure will be controlled somewhat at the obligation stage. Under the Administrator's construction of the Act and the discretion that he believes Congress intended to give him, there is no way to accurately plan for the use of money beyond that which has actually been allotted. Furthermore, this method makes it difficult to plan staffing requirements and difficult to kindle local interest in planning for projects that have no assurance of funding. Under the respondents' construction of the Act and the Administrator's discretion thereunder, as found by the district and appellate courts in this matter, the actual money that New Jersey will get will be known, and even though the obligation date may be unknown (as with all projects initially submitted for approval), plans can be laid to construct as quickly as possible all of the sewage treatment facilities made possible by the Act. It cannot be gainsaid that Congress intended the discretion over spending to be exercised in *the* manner most harmonious with achieving the goals for which the money was authorized, and not in a manner which directly perpetuates the funding evils that Congress took great pains in curbing by enacting contract authority.

CONCLUSION

For the reasons set forth above and in the brief of the City of New York, it is respectfully submitted that the judgment of the Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1377

RUSSELL E. TRAIN
Administrator, United States
Enviornmental Protection Agency
vs. *Petitioner,*

THE CITY OF NEW YORK
on behalf of itself and all other
similarly situated municipalities
within the State of New York, et al.
Respondents.

No. 73-1378

RUSSELL E. TRAIN
Administrator, United States
Enviornmental Protection Agency
vs. *Petitioner,*

CAMPAIGN CLEAN WATER, INC. *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE FOURTH CIRCUIT

BRIEF FOR STATE OF OHIO AS AMICUS CURIAE SEEKING AFFIRMANCE

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AND THE FOURTH CIRCUIT

BRIEF FOR STATE OF OHIO AS AMICUS CURIAE SEEKING AFFIRMANCE

QUESTIONS PRESENTED

I. Whether Congress granted the Administrator of the United States Environmental Protection Agency discretion to control the rate of spending under the grant program of Title II of the Federal Water Pollution Control Act Amendments of 1972 by making allotments to states of less than the full amounts authorized.

II. Whether the doctrine of soverign immunity bars an action against the Administrator to compel the allotment of funds authorized by Congress in the Federal Water Pollution Control Act Amendment of 1972.

STATEMENT OF CASE

Amicus adopts the Statement of the Case as presented by Respondents.

INTEREST OF AMICUS

The failure of the Administrator of the United States Environmental Protection Agency to allot the full sums authorized by Congress in the Federal Water Pollution Control Act Amendments of 1972 ("the act") for state and local government construction of sewage treatment plants, has seriously jeopardized Ohio's efforts to improve the quality of its water.

The Administrator's unlawful actions caused Ohio to be alloted $346,422,000 less for fiscal years 1973 and 1974, and $150,909,300 less for fiscal year 1975, than would have been allotted had the Administrator allotted the entire amount required.

Because of the decrease in funding available for public waste water treatment projects in Ohio, many municipal and regional waste water treatment programs will be unable to achieve

the goal of the Act set forth in 33 U. S. C. Section 1311 [Section 301] that all publicly owned treatment plants employ secondary treatment or meet water quality standards by 1977.

Furthermore, as a result of the Administrator's unlawful actions, only 97 projects will receive federal assistance. Some 246 fully planned construction projects in Ohio would have been eligible for funding had full allotment been made. The remaining 149 municipalities will be unable to construct waste water treatment plants that are badly needed by the citizens of Ohio.

ARGUMENTS

Introduction

Amicus, State of Ohio, urges the Court to affirm the decisions of the District Courts and the Courts of Appeals in the cases of *City of New York v. Train* and *Campaign Clean Water, Inc. v. Train.*

Amicus interprets Sections 205(a) and 207 of the Act as granting no discretion whatsoever to the Administrator to allot less than all the funds authorized by Congress for construction of municipal waste water treatment facilities. The Act and its legislative history clearly support this position.

Amicus also contends that sovereign immunity does not bar an action to require the Administrator to comply with the Act's mandate and allot the full sums authorized to the states. It is well established that an exception to the doctrine of sovereign immunity is the failure of a public officer to perform an act in which he has no discretion.

I

The Congress has not granted the Administrator of the United States Environmental Protection Agency discretion to control the rate of spending under the Grant Program of Title II of the Federal Water Pollution Control Act Amendments of 1972 by making allotments to states under 33 U. S. C. 1285(a) [Section 205(a)] of less than full amounts authorized by 33 U. S. C. 1287 [Section 207].

A. Section 205 (a) requires the administrator to allot all the amounts authorized by Section 207.

The Administrator was granted no discretion whatsoever by Congress to withhold funds at the allotment stage that were authorized to be appropriated by 33 U. S. C. Section 1287 [Section 207] and required to be alloted by 33 U. S. C. Section 1285(a) [Section 205(a)]. It is the interpretation of these two sections which forms the principal issue of this case. 33 U. S. C. Section 1285 [Section 205] and Section 1287 [Section 207] provide:

> Sec. 205. (a) Sums authorized to be appropriated pursuant to Section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of Table III of House Public Works Committee Print No. 92-50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974 shall be made only in accordance with a revised cost estimate and submitted to Congress in accordance with Section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.
>
> (b)(1) Any sums allotted to a State under subsection (a) shall be available for obligation under Section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be

immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

(2) Any sums which have been obligated under Section 203 and which are released by the payment of the final voucher for the project shall be immediately credited to the State to which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immediately available for obligation in the same manner and to the same extent as such last allotment.

Sec. 207. There is authorized to be appropriated to carry out this title, other than Sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1976, not to exceed $7,000,000,000.

The language upon which amicus bases its arguments is that of 33 U. S. C. Section 1285(a) [Section 205(a)], which mandated that "[s]ums authorized to be appropriated pursuant to Section 207. . *shall* be allotted by the Administrator. . ."(Emphasis added.) Thus, the act of allotment is devoid of discretion on the part of the Administrator. He must allot all "sums authorized to be appropriated."

33 U. S. C. Section 1287 [Section 207] sets forth the "sums authorized to be appropriated:" "There is authorized to be appropriated to carry out this title. . .not to exceed [$11 billion for fiscal years 1973 and 1974]." While conceding that the act of allotment is mandatory, the Administrator asserts that the inclusion of the words "not to exceed" in 33 U. S. C. Section 1287 [Section 207] empowers him to allot to the states less than the total authorized amount. Amicus asserts, however, that the words "not to exceed" grants discretion to withhold funds, if at all, only at the obligation stage of expenditure of funds. Thus, as other provisions of the Act and pertinent legislative history discussed below clearly demonstrate,

the intent of Congress was to provide for allotment of the entire amount of authorized funds. Thereafter, amounts "not to exceed" the authorized maximum will be obligated and expended upon eligible projects presented to the Administrator for funding.

Congress evidenced its commitment to the construction of municipal wastewater treatment facilities in passing the Federal Water Pollution Control Act Amendments of 1972. This commitment was manifested in the language and scheme of the Act in three ways:

First, in 33 U. S. C. Section 1251 [Section 101], Congress unequivocally establishes that, *"it is the national policy that the Federal financial assistance be provided to construct publically owned waste treatment works."* (Emphasis added.)

Secondly, in Title II of the Act, entitled "Grants for Construction of Treatment Works" it is stated that "[i]t is the purpose of [Title II] *to require and to assist* the development and implementation of waste treatment management plans and practices which will achieve the goals" of providing swimmable and habitable waters by mid-1983 and of completely eliminating the discharge of pollutants by 1985. (Emphasis added.) To this end, the Administrator is authorized to make grants for the construction of publicly-owned waste treatment works in the amount of 75 percent of the total construction cost.

Thirdly, Title III of the Act establishes firm deadlines by which certain levels of sewage treatment are to be achieved. These deadlines and levels are legally enforcable in a number of ways, and specific sanctions are prescribed for their violation. 33 U. S. C. Section 1311 [Section 301(a)] provides in part that "[e]cept as in compliance with this section * * * the discharge of any pollutant by any person shall be unlawful." The Administrator must enforce Section 301 violations, pursuant to 33 U. S. C. Section 1319 [Section 309]. A private litigant can also enforce Section 301 violations under 33 U. S. C. Section 1365 [Section 505].

Thus, it is clear that the language and statutory scheme of the Act require the Administrator to allot to the states all the amounts authorized by 33 U. S. C. Section 1287 [Section 207]. To conclude otherwise places the proprietors of public wastewater treatment facilities upon the horns of a dilemma: either to attempt to bear the impossible burden of financing all of the required construction, or to incur civil and criminal liability.

B. The legislative history of the Water Pollution Control Act Amendments of 1972 demonstrates that Congress did not intend to grant the Administrator authority to allot less than the full amounts authorized.

The legislative history of the Act also supports the interpretation of 33 U. S. C. Section 1285(a) [Section 205(a)] as mandating allotment of all funds authorized by 33 U. S. C. Section 1287 [Section 207]. Statements made by Senator Muskie and Congressman Harsha, members of the conference committee which drafted the final version of the Act, are particularly instructive.

In submitting the conference committee report on S. 2770, Senator Edmund Muskie, the bill's principal sponsor and the manager of the Senate conferees, discussed the high level of authorized funding as follows:

> * * * * [T]hose who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this [water pollution] crisis.
>
> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the Federal Government in 75 percent grants to municipalities during fiscal years 1973-75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation. * * * *
>
> * * * * *[T]he conferees are convinced that the level of investment that is authorized is the minimum dose of medicine that will solve problems we face.* 118 Cong. Rec. S16870-71 (Daily ed. Oct 4, 1972). (Emphasis added.)

After pointing up the urgency of the needs that had prompted the conference committee to authorize appropriations of large sums of money for waste treatment plant construction, Senator Muskie touched briefly on two changes in wording that had been made by the conferees to grant the executive branch a limited measure of discretion in controlling the rate of spending under the Act.

> * * * * [T]he conferees attempted also to reduce the possibility that this legislation would be vetoed. In our last conference, the able and distinguished ranking minority member of the House Committee on Public Works offered two amendments which he indicated would reduce opposition to the bill from the White House and the Office of Management and Budget. These two amendments were accepted by your [Senate] conferees * * * in order to remove the question of veto on the basis of the money authorized by the legislation.
>
> Under the amendments proposed by Congressman William Harsha and others, the authorizations for obligational authority are "not to exceed" $18 billion over the next three years. Also, "all" sums authorized to be obligated need not be committed, *though they must be allocated.* These two provisions were suggested to give the administration some flexibility concerning the *obligation* of construction grant funds.
>
> The conferees do not expect these provisions to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the act. At the same time, there may be instances in which the obligation of funds to a particular project in a particular State may be contrary to other public policies such as the National Environmental Policy Act. In these cases the conferees would, of course, expect the administration to refuse to enter into contracts for construction. [Id. at S. 16871.] (Emphasis added.)

There was no further mention of these two conference committee amendments on the floor of the Senate; after discussing other aspects of the bill, the Senate voted unanimously (74-0) in favor of the bill's enactment. Thus, Senator Muskie ascribed to the Administrator some discretion to withhold funds, *but only at the obligation stage,* i.e., the actual expenditure of funds for a specific project, and not at the allotment stage.

Statements by Congressman Harsha indicate his agreement with Senator Muskie that any discretion on the part of the Administrator is limited to the obligation stage. Turning to the two amendments mentioned by Senator Muskie in the Senate discussion, Congressman Harsha stated:

> * * * I want to point out that the elimination of the word "all" before the word "sums" in Section 205(a) and insertion of the phrase "not to exceed" in Section 207 was intended by the managers of the bill to emphasize the President's flexibility to control the rate of spending.
>
> * * * *
>
> Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications and estimates. *This is the pacing item in the expenditures of funds.* It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures. [Id. at H. 9122.] (Emphasis added.)

C. The authority to control the rate of spending may not be exercised by allotting less than the amounts authorized to be appropriated.

In sum, the Administrator's claim that he holds authority to allot less than the full amounts authorized for allotment by 33 U. S. C. Section 1287 [Section 207] has no basis in the language of 33 U. S. C. Section 1285(a) [Section 205(a)] and Section 1287 [Section 207], other provisions of the Act, nor in pertinent legislative history.

Of the numerous cases decided by the lower federal courts only one case has been decided in which a court favored an interpretation of the Federal Water Pollution Control Act Amendments of 1972 granting the Administrator discretion to withhold funds at the allotment stage, *Brown v. Ruckelshaus,* 364 F. Supp. 258 (C. D. Cal., 1973). It should be noted that in *Brown,* the District Court reached the merits of the question presented to the Court by this case only after holding that the action should be dismissed due to a lack of standing on the part of the plaintiff. Clearly, this *obiter dicta* represents an erroneous conclusion, which flies in the face of the clear meaning of the Act and its legislative history. In *Campaign Clean Water v. Ruckelshaus,* 361 F. Supp. 689 (E. D. Va., 1973), plaintiff prevailed, but asserted not that the Administrator had no discretion at the allotment stage, but rather that he had abused his limited discretion.

In the other seven cases decided on the merits by the District Courts it was held that the correct interpretation of the Federal Water Pollution Control Act Amendment of 1972 grants the Administrator no discretion to withhold funds and requires allotment of the full sums authorized by 33 U. S. C. Section 1287 [Section 207]. *City of New York v. Ruckelshaus,* 358 F. Supp. 669 (D. D. C., 1973); *State of Minnesota v. Fri,* D. Minn., No. 4-73, Civ. 133, June 25, 1973; *Martin - Trigona v. Ruckelshaus,* N. D. Ill., 72-C-3044, June 29, 1973; *State of Texas v. Ruckelshaus,* W. D. Tex., C. A. No. A-73-CA-38, October 2, 1973; *State of Florida v. Train,* N. D. Fla., Civ. No. 73-156, February 25, 1974; *State of Maine v. Train,* D. Maine, Civ. No. 14-51, June 21, 1974; *State of Ohio v. Administrator, United States Environmental Protection Agency,* N. D. Ohio, Nos. C73-1061 and C74-104, June 16, 1974.

Thus, it is clear from the Act and its legislative history that the Administrator lacks discretion to control the rate of spending at the allotment stage by alloting to the states less than the full amounts authorized by Congress.

II

The Doctrine of Sovereign Immunity does not bar an action to compel allotment of funds authorized by Congress in the Federal Water Pollution Control Act Amendments of 1972.

Sovereign immunity is not an absolute bar to a suit against an officer of the sovereign where there has been no consent to be sued. The doctrine of sovereign immunity is generally applicable, with exceptions, to suits "against the sovereign if 'the judgment would expend itself on the public treasury or domain, or interfere with the public administration,' * * * or if the effect on the judgment would be 'to restrain the Government from acting, or to compel it to act,'" *Dugan v. Rank,* 372 U.S. 609, 620 (1963). In its inquiry into the defense of sovereign immunity raised by the United States in a suit against reclamation officials over water rights in Oregon, the Court set forth explicit exceptions to the doctrine:

> Nor do we believe that the action of the Reclamation Bureau officials falls within either of the *recognized exceptions to the above general rule* as reaffirmed only last term * * * * Those exceptions are (1) *action by officers beyond their statutory powers* and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void * * * * *In either of such cases the officer's action "can be made the basis of a suit for specific relief against the officer as an individual* * * * * "
>
> *Dugan v. Rank, supra,* 372 U.S. at 621-22 (Emphasis added).

See also, *Marlowe v. Bowdoin*, 369 U.S. 643, 647 (1962); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-91 (1949).

As the Administrator has acted beyond his statutory powers in refusing to allot among the states the funds authorized by Congress in Section 207 of the Act, the case at bar is clearly included in the first exception recognized by the Court in *Dugan.* See also, *State Highway Commission of Missouri v. Volpe,* 479 F. 2d 1099 (8th Cir., 1973).

Also notable in this context is the case of *Littell v. Morton*, 445 F. 2d 1207 (4th Cir., 1971). The Court in *Littell* held that an action may be brought against the United States for compensatory damages - even when the two traditional exceptions set forth in *Dugan v. Rank* do not apply - if the following conditions are satisfied: (1) the Administrative Procedure Act authorizes judicial review, and (2) facts of the case are not such that dismissal is required to satisfy the underlying policies of the doctrine of sovereign immunity. The case at bar falls within the requirements of *Littell* in the following respects: The requirements of review under the Administrative Procedure Act are satisfied in that respondents are "persons ***adversely aggrieved by agency action," 5 U. S. C. Section 704; the action of the Administrator is a "final action for which there is no other adequate remedy in a court," 5 U. S. C. Section 704; allotment is not "committed to agency discretion by law," 5 U. S. C. Section 701(a)(2); and the action of the Administrator was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. 706(2)(A). Furthermore, the

doctrine of sovereign immunity does not compel dismissal, for this action does not cause a substantial interference with the regulatory program of the Administrator, but, rather, seeks that the program be administered in accordance with law. In sum, the tests of both *Dugan* and *Littell* are satisfied by the case at bar.

Petitioner appears to argue that the doctrine of sovereign immunity automatically comes into play, regardless of the nature of the action, whenever the ultimate result of any judgment will be the expenditure of public funds. That contention cannot be squared either with the Supreme Court's language in *Dugan* or with the doctrine that the provisions of the Administrative Procedure Act serve as an exception to the immunity doctrine. Indeed, to support its contention the petitioner places great reliance upon the Court's holding in *Hawaii v. Gordon,* 373 U.S. 57 (1963). That case, it should be noted, is a per curiam decision accompanied by an opinion less than a page in length, and was decided only two weeks after *Dugan*. It merely represents, therefore, an application of the sovereign immunity doctrine and exceptions thereto.

Furthermore, it should be noted that the immediate expenditure of public funds is not involved in this action, thus further weakening petitioner's argument. Respondents seek relief whereby funds will be *allotted* for expenditure should a project be approved for funding by the Administrator. Thus, although allotment is a prerequisite to expenditure, actual disbursement of funds is not mandated by the fact of allotment.

Several federal district courts have been presented this issue in cases virtually identical to the instant case. Each has held that the first exception provided by *Dugan* is directly applicable, i.e., that in an action in which a government official is alleged to have exceeded his statutory authority, immunity does not lie, even if the expenditure of public funds may result. *Cf. State of Minnesota v. Fri*, D. Minn. No. 4-73, Cir., 133, June 25, 1973; *State of Texas v. Ruckelshaus*, W. D. Tex., C. A. No. A-73-CA-38, October 2, 1973.

In short, the theory of sovereign immunity is not applicable to this case, for the Administrator's actions fall within an established exception to the doctrine. Furthermore, the relief afforded by the courts below does not require the obligation or expenditure of appropriated monies; rather, the Administrator has been directed to perform a non-discretionary duty.

CONCLUSION

The judgments of the Courts of Appeals in both cases should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 1974, a copy of the State of Ohio's Amicus Brief seeking affirmance was served to all counsel of record in the main proceeding. I further certify that all parties required to be served have been served.

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Supreme Court, U. S.
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AMICUS CURIAE BRIEF OF THE STATES OF TEXAS, WISCONSIN, MISSOURI, OKLAHOMA AND KANSAS

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AMICUS CURIAE BRIEF OF THE STATES OF TEXAS, WISCONSIN, MISSOURI, OKLAHOMA AND KANSAS

INTRODUCTION

In October, 1972, after more than two years of deliberation, Congress overwhelmingly passed a far-reaching water pollution control bill which had as its objective the restoration of the nation's waters to their natural state.[1] The heart of this ambitious undertaking was the commitment of vast amounts of federal funds to state and local governments to assist in the contruction of sewage treatment plants. The administration had opposed the bill because of the funding mechanism employed in the bill to ensure the availability of these sums. Consistent with that position, the President vetoed the bill, citing its inflationary nature. When the vetoed bill was returned to the Congress, the principal spokesmen for the bill in both houses, while acknowledging the magnitude of the federal spending called for, reiterated the vital importance of cleansing this country's lakes and streams; the veto was overriden by decisive margins.

A month later, the President ordered the Administrator of the Environmental Protection Agency[2] to allot to the States only $5 billion of the $11

[1]The bill, S. 2770, 92d Cong., 2d Sess., was enacted as the Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816, 33 U.S.C. §§ 1251 *et seq.* (Supp. 1974) (hereinafter referred to as the "Act").

[2]Hereinafter referred to as "the Administrator". At the time the actions complained of herein took place and at the time this action was commenced, the Administrator was William D. Ruckelshaus. The present Administrator is Russell E. Train, the Petitioner herein.

billion authorized by Congress for the first two fiscal years of the program's operation, thus seeking to accomplish by the controversial practice of "impoundment"[3] what he had failed to achieve in exercising his constitutional veto power.

INTEREST OF AMICI

The first interest of the *amici* is purely a legal one. The Court's decision in the instant cases will be largely determinative of similar litigation presently pending in the Court of Appeals for the Fifth Circuit in which Texas, Wisconsin, Missouri, Oklahoma, and Kansas, *amici* herein, are parties.[4] *Amici* have petitioned for writ of certiorari prior to a decision on the merits by the court of appeals, feeling that judicial economy and the interests of all parties would be served by joining the *Texas* case with the *City of New York* and the *Campaign Clean Water* cases for final resolution by the Court.[5] While granting of certiorari in these circumstances

[3]As used herein, the term "impoundment" means any action of the Executive which prevents the allotment, obligation, or expenditure of funds authorized or appropriated by Congress.

[4]*Texas v. Train*, Nos. 73-3965 & 73-4026 (5th Cir., filed Jan. 9, 1974). Written briefs have been filed and oral argument was held before the court of appeals on April 29, 1974, the date on which this court granted petitions for certiorari in the instant cases. On May 28, 1974, the court of appeals informed counsel that "... disposition of [*Texas v. Train*] is being withheld pending decision of the Supreme Court in the [*City of New York* and *Campaign Clean Water* cases]...." (Addendum I hereto).

[5]*Texas v. Train*, No. 73-1895 (Sup. Ct., filed June 19, 1974).

would both be appropriate and consistent with the past practice of the Court,[6] prudence dictates that an *amicus* brief be filed at this time so that the views of Texas and her sister States in this litigation may be known to the Court in the event certiorari is denied.

The second interest derives from the concern of *amici* for the health, safety, and welfare of their citizens who depend for their recreation, their livelihood, and their very existence on the waters of the States. Without the funds that have been impounded by the Administrator, many needed municipal pollution control facilities will not be built, and the waters into which raw or inadequately treated municipal sewage now runs daily will continue to deteriorate.

A good starting point to understanding the damage the Administrator has inflicted by his impoundment action is to note the dramatic difference between the sums the *amici* States have actually received under the reduced allotments ordered by the President and the sums these States would have received had full allotment been permitted. That difference is revealed in the following tables.

[6]See e.g., *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Taylor v. McElroy*, 360 U.S. 709 (1959); *Brown v. Board of Education of Topeka*, 344 U.S. 1 (1952); C. WRIGHT, FEDERAL COURTS § 106, pp. 477-78 (1970).

Table 1: Full Allotments & Reduced Allotments for Fiscal Years 1973 and 1974

States' Percentage Share	FULL ALLOTMENT $5 Billion 1973	FULL ALLOTMENT $6 Billion 1974	REDUCED ALLOTMENT $2 Billion 1973	REDUCED ALLOTMENT $3 Billion 1974
Texas 2.7694%	$138,470,000	$165,744,000	$55,388,000	$83,082,000
Wisconsin 1.7415%	$ 87,075,000	$104,490,000	$34,830,000	$52,245,000
Missouri 1.6556%	$ 82,780,000	$ 99,336,000	$33,112,000	$49,668,000
Oklahoma .4608%	$ 23,040,000	$ 27,648,000	$ 9,216,000	$13,824,000
Kansas .3742%	$ 18,710,000	$ 22,452,000	$ 7,484,000	$11,226,000

Table 2: Summary of Total Allotments & Effect on States for Fiscal Years 1973 and 1974.

State	Total Reduced Allotment 1973 & 1974	Total Full Allotment 1973 & 1974	TOTAL AMOUNT WITHHELD
Texas	$138,470,000	$304,214,000	$165,744,000
Wisconsin	$ 87,075,000	$191,565,000	$104,490,000
Missouri	$ 82,780,000	$182,116,000	$ 99,336,000
Oklahoma	$ 23,040,000	$ 50,688,000	$ 27,648,000
Kansas	$ 18,710,000	$ 41,162,000	$ 22,452,000

As can be seen rather readily, the practical effect of the Administrator's action was to give to the States for fiscal years 1973 *and* 1974 what they should have received for 1973 *alone*. In short, the States were effectively denied their fiscal 1974 allotment.

The amount in controversy, then, insofar as *amici* are concerned, is approximately $420 million. In anyone's terms, this is a truly significant sum of money. The sheer size of the amount suggests strongly that its impoundment has injured the *amici* States grievously. But the true magnitude of the damage cannot be assessed until what has been withheld is contrasted with what the States really need to meet the clean water goals of the Act.

The Administrator, predictably, would have the Court believe that his impoundment of these great sums has caused no injury at all. Appended to his brief is a table summarizing the status of the grant program as of May 31, 1974.[7] It shows generally that the States have yet to use up even the limited amounts they have already been alloted. Texas, for example, is shown as having obligated 99% of its 1973 allotment ($55 million), but only 5% of its 1974 allotment ($83 million), and none of its 1975 allotment ($107 million). The implication, indeed the express meaning, of this data, according to the Administrator, is that the States have not suffered any adverse effect — that is, no qualified project has been turned back — because of the paucity of

[7]Brief for the Petitioner at 49.

the allotments, and that no such effect will be felt unless the President, when the currently allotted sums are exhausted, "decides not to authorize immediately further allotments . . . ."[8]

This picture is highly misleading. First of all, it is grossly at odds with the evidence — evidence undisputed by the Administrator — presented in *Texas v. Train* which showed that Texas, as of June, 1973, had 164 present and pending grant applications totalling $179,456,924, approximately $41 million more than the *combined* total of the Texas allotments for fiscal years 1973 *and* 1974.[9] The evidence also showed that 34 grant applications had already been returned to Texas as not being high enough on the State's priority list to be eligible for 1973 funds.[10] This evidence was likewise undisputed by the Administrator. The situation is no better today, even though the allotment for fiscal year 1975 has now been received.[11] Texas' current list of

[8]*Id.* at 7.

[9]Affidavit of Hugh C. Yantis, Executive Director of the Texas Water Quality Board filed in *Texas v. Fri*, A-73-CA-38 (W.D. Tex., decided Oct. 2, 1973). This evidence was specifically noted by the district court in ruling that the Administrator had violated the Act. See copy of the district court's unpublished opinion appended to the petition for certiorari filed by *amici*. Note 5, *supra*. Similar undisputed evidence was offered by Wisconsin and Missouri and may be found in the printed appendix in the court of appeals at pages 61-70 and pages 86-89, respectively.

[10]Yantis affidavit. This evidence was likewise noted in the district court's opinion.

[11]Practically before the ink was dry on the district court's order disallowing the impoundment of 1973 and 1974 funds, the Administrator, on January 10, 1974, impounded $3 billion of the $7 billion authorized by the Act for fiscal year 1975. Texas has filed suit challenging this action. *Texas v. Train*, No. A 74 CA 004 (W.D. Tex., filed Jan. 14, 1974).

grant applications amounts to $169 million, approximately $27 million more than the $142 million still available for obligation.[12] Many of these applications are for just the preparation of preliminary design studies. To actually construct these projects will require at least $615 million. Thus the real deficit in grant funds is approximately $450 million.[13]

These figures, while staggering, still do not show fully the dimensions of the municipal waste treatment problems facing the States, because they only represent waste treatment needs that have been formally translated into grant applications. What are the *real* needs of the States? The latest EPA survey of what it will cost the States to meet the goals and deadlines of the Act reveals that the nationwide figure is not $18 billion, as estimated by EPA in 1971 and adopted by Congress in the Act in 1972, but over three times that amount — $60.1 billion.[14] The striking difference between the EPA estimated needs in each of the *amici*

[12]These figures are based on data compiled by the Texas Water Quality Board and communicated by letter to the Texas Congressional delegation dated July 2, 1974. A news account of that letter and a listing of the Texas projects that will not be funded as a result of the inadequacy of the present allotments is attached hereto as Addendum II. TEXAS POLLUTION REPORTS, July 2, 1974 at p. 2.

[13]*Id.*

[14]Environmental Protection Agency, *Report to the Congress: Costs of Construction of Publicly-Owned Waste Water Treatment Works: 1973 "Needs" Survey* (revised, Nov. 1973) at B-1. Among the reasons listed by EPA for the over 300% increase between the 1971 and 1973 estimates were the Act's 1977 "secondary treatment" deadline, new requirements to meet more stringent water quality standards, and increased construction costs. *Id.*

States and the amounts the Administrator has allotted is shown in the following table.

Table 3: Estimated Costs vs. Amounts Allotted

State	Estimated Cost[15] (Millions of Dollars)	Combined Allotment FY 1973-1975 (Millions of Dollars)	Deficit (Millions of Dollars)
Texas	889	244	645
Wisconsin	787	139	648
Missouri	972	158	814
Oklahoma	624	70	554
Kansas	671	58	613

That the States desperately need what has been withheld from them in water pollution funds is therefore beyond the slightest question. The delays that have precluded the immediate obligation of the patently inadequate sums that have been allotted — the principal cause of which has been EPA's changing grant requirements[16] — should not be allowed to obscure this fact. Moreover, the Administrator's impoundment of funds has undeniably had a "chilling effect" on those municipalities who might otherwise have sought a grant from EPA. With present

[15]*Id.* at 12.

[16]See, *Hearings Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 93d Cong., 1st Sess., on the Environmental Protection Agency's 1973 Needs Survey* at pp. 27, 32-33 (remarks of John Quarles, Deputy Administrator of EPA).

allotments obviously inadequate to fund even existing grant applications, there is little incentive to suffer the time and expense of completing and processing a grant form. Allotment of the funds that have been impounded would clearly allow more applications to be processed by the States and forwarded to EPA for its consideration. In a word, the Act's program to help cleanse this Nation's waters of municipal waste could proceed as Congress intended.

ARGUMENT AND AUTHORITIES

A. *Summary of Argument.*

It is the position of *amici* that the Administrator is afforded *no discretion* by the Act to determine what amounts to allot among the States and that, indeed, he is required to allot $5 billion and $6 billion for fiscal years 1973 and 1974, respectively, which are the full sums authorized by the Act. First, the conclusion that Congress intended to permit an allotment of less than the full sums authorized to be appropriated is totally at odds with the clear legislative intent, manifested by the Act as a whole and its legislative history, that the objectives of the Act be achieved and that the full sums authorized for municipal sewerage construction represented the minimum amounts required to do so. Secondly, the legislative history of the Conference Committee amendments upon which the Administrator relies to justify his action makes clear

that any control over the rate of actual expenditure funds was intended by Congress to be exercised at the project approval stage, rather than at the allotment stage, and even then only insofar as it remained consistent with the clean water objectives of the Act. Thus by reducing allotments for anti-inflationary considerations, the Administrator acted at the wrong time for the wrong reason. The Administrator's recently contrived argument that he is empowered to make subsequent allotments, thereby controlling the "rate" of spending, is without support in the Act and is, indeed, at odds with the Act's mechanism for continual funding, the process of "reallotment".

The Administrator's jurisdictional arguments are likewise without merit. At issue is whether the Administrator violated the Act by impounding over half what Congress had so carefully concluded would be required to assist the States and cities in meeting the Act's rigorous deadlines and goals. Determining what the law is has historically been the function of the Judiciary, and neither the doctrine of sovereign immunity nor that of political question are available to block the courts from performing that function in this case.

B. *The only discretion given the Administrator by the Act in the construction grant funding process is at the project approval stage, rather than the allotment stage, and must be exercised in a manner consistent with the requirements and purposes of the Act.*

1. *The Act, its background and purposes.*

Trying to avoid the inescapable conclusion that he has blatantly ignored the will of Congress by the action complained of here, the Administrator has omitted from his brief any discussion of the overall Act as it interrelates with the grant program, and has likewise failed to mention the background against which the Act was passed. No doubt the City of New York and Campaign Clean Water will detail these matters for the Court. *Amici* would simply note two salient points.

First, until the passage of the Act in 1972 the federal program of waste treatment grants had been an abysmal failure. One of the principal reasons was the method of funding the program — the traditional authorization/appropriation process. Under the old Federal Water Pollution Control Act, as amended, only those sums actually appropriated by Congress pursuant to the authorization contained in the Act could be allotted to the States and "[n]either a finding by the Secretary that a project meets the requirements of this subsection, nor any other provision of this subsection shall be construed to constitute a commitment of the United States to provide funds or pay any grant for such project." 33 U.S.C. § 1158 (1970). As happens so often, Congress never appropriated as much as it had authorized. As an inevitable result, construction of treatment works proceeded at an agonizingly slow pace. In 1971 the Senate Committee on Public Works, in a report to the full Senate on its version of the new Act (S. 2770), observed that:

> [t]he lack of adequate funding of grants to assist States and localities in constructing sewage treatment plants is causing critical problems.
>
> Of the $3.4 billion authorized for this purpose by the 1966 legislation, only $2.2 billion was appropriated. The backlog of projects eligible for Federal payments has reached a total of nearly $2 billion.[17]

The Administration's proposal for federal assistance for waste treatment construction, embodied in S. 1013 submitted by Senator John Sherman Cooper in 1971, would have perpetuated the traditional funding process with an authorization to appropriate $6 billion over a three year period. Both the Senate (in S. 2770) and the House (in H.R. 11896) rejected this approach in favor of contract authority. Congress stood firm in its choice of this funding mechanism, despite the opposition of then Administrator Ruckelshaus that the contract authority approach "sidesteps all the safeguards provided by the budgetary-appropriations process."[18]

It is at best illogical, and at worst absurd, to suggest that Congress chose allotment and contract authority

[17] S. Rept. No. 92-414, 92nd Cong., 1st Sess. 5 (1971); 2 U.S. Code Cong. Admin. News at 3672 (1972); Library of Congress, *A Legislative History of the Federal Water Pollution Control Act Amendments of 1972* at 1415, 1423 [hereinafter referred to as *Legislative History*].

[18] *"Hearings Before the Committee on Public Works, House of Representatives, 92d Cong., 1st Sess., on H.R. 11896, H.R. 11895* at 297; *Legislative History* at 1195. (Ruckelshaus letter of December 13, 1971, to Rep. John A. Blatnik, Chairman, Committee on Public Works).

over the Administration's objections to remove the uncertainty from the construction grant program, and then simultaneously reinjected the same uncertainty back into the system by giving the Administrator the discretion to choose the amount to be made available by allotment.

Second, the 1972 Act made the grant program an integral part in achieving the Act's overall purpose — "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)(1974 Supp.). Of the $24.6 billion authorized to implement the Act, $20.75 billion ($18 billion for fiscal years 1973-1975, and $2.75 billion for reimbursement of projects already underway in 1972 with State funds) was designated for the grant program.

Congress concluded that these substantial sums for waste treatment plant construction were needed to assist States and local governments in achieving two specific requirements of the bill. First, the Act requires generally that "secondary" or "more stringent" sewage treatment be achieved in all publicly owned treatment works existing on July 1, 1977. 33 U.S.C. § 1311(b)(1)(B)(1974 Supp.). Secondly, the Act requires that by July 1, 1983, all publicly owned treatment works provide for the application of the "best practicable" waste treatment technology over the life of the plant. 33 U.S.C. § 1311(b)(2)(B)(1974 Supp.).

Having set the deadlines and goals and provided the financial assistance to meet them, Congress created a rigorous mechanism of enforcement. Violation of the Act renders a municipality liable for civil penalties up to $10,000 a day. Willful or negligent violations are punishable by criminal fines from $2,500 to $25,000 per day, by imprisonment for not more than one year, or both.[19] 33 U.S.C. § 1319 (1974 Supp.). The Act may also be enforced by private citizens. 33 U.S.C. § 1365 (1974 Supp.). Successful private litigants may obtain, in addition to injunctive relief, their costs of litigation, including attorney and expert witness fees. *Id.*

By enactment of this interrelated statutory scheme of deadlines, assistance, and enforcement, Congress sought to require the Administrator to conduct a waste treatment plant construction grant program to ensure generally the restoration of the nation's navigable waters to their natural state, the attainment of secondary or more stringent treatment by mid-1977, and the employment of "best practicable" treatment technology by mid-1983.

The Administrator's impoundment of funds has made attainment of these goals impossible, and has left the States and cities vulnerable to civil and criminal

[19] If a municipality is a party to a civil action under the Act, the State in which the municipality is located must be joined as a party and, to the extent that State law prevents the municipality from raising funds to pay a civil penalty, the State shall be liable for the payment of any judgment.

liability. This cannot have been the intent of Congress.[20]

2. *The Meaning of the "Harsha Amendments".*

Ignoring the rest of the Act and its legislative history, the Administrator cites two small alterations made in S. 2770 by the Conference Committee as supporting his right to allot as much or as little as he pleases.[21] The two amendments in question were to Sections 205 and 207 of the Act, as shown below (bracketed material deleted, italicized material added).

ALLOTMENT

> Sec. 205 (a) [All] sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, *shall be* allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments . . . .

* * * *

AUTHORIZATION

> Sec. 207. There is authorized to be appropriated to carry out this title . . . for the fiscal year ending June 30, 1973, *not to exceed* $5,000,000,000, for the fiscal year ending June 30, 1974, *not to exceed* $6,000,000,000 and for the fiscal year ending June 30, 1975, *not to exceed* $7,000,000,000.

[20]In the hearings on EPA's 1973 needs survey, Senator Muskie expressed concern over this problem, noting that "Congress considered funding as inextricably related to the deadlines and statutory objectives." See Needs Survey Hearings, *supra*, note 16 at 52.

[21]Brief for the Petitioner at 16-19.

The explanatory statements made by Congressman Harsha, the conferee at whose suggestion the amendments were made, and those of Senator Muskie, the manager of the Senate conferees and the bill's principal sponsor, make clear, however, that these amendments were simply to clarify the Administrator's flexibility to control the actual *expenditure* of funds, and were not meant to permit a reduction in the amounts made available at the allotment stage for potential obligation and expenditure. Here it is important to remember that commitment or obligation of funds can occur under the Act only when and if the Administrator approves a specific waste treatment project. 33 U.S.C. § 1284 (1974 Supp.).

In explaining the amendments to the House on October 4, 1972 (before the President's veto), Congressman Harsha stressed that their sole purpose was to ensure that the Administrator would have flexibility with regard to the obligation and expenditure of funds:

> I want to point out that the elimination of the word "all" before the word "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207 was intended by the managers of the bill to *emphasize* the President's flexibility to control the *rate* of spending. (Emphasis added.)[22]

[22]118 Cong. Rec. at H 9122 (Daily ed. October 4, 1972); *Legislative History* at 243.

A discussion among Congressmen Gerald R. Ford, Harsha and Jones[23] sheds further light on the meaning and intent of the amendments:

> MR. GERALD R. FORD . . . . I think it is vitally important that the intent and purpose of section 207 is spelled out in the legislative history here in the discussion on this conference report.
>
> As I understand the comments of the gentleman from Ohio (Harsha), the inclusion of the words in section 207 in three instances of "not to exceed" indicates that is a limitation. More importantly that it is not a mandatory requirement that in 1 year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation* or *expenditure* ?
>
> Mr. HARSHA. I do not see how reasonable minds could come to any other conclusion than that the language means we can *obligate* or *expend up to that sum* — anything up to that sum but not to exceed that amount . . . .
>
> Mr. GERALD R. FORD. Mr. Speaker, I would like to ask the distinguished chairman of the subcommittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio. (Mr. HARSHA).
>
> Mr. JONES of Alabama . . . . My answer is "yes". Not only do I agree with him, but the gentleman from Ohio offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio. (Mr. HARSHA).

[23]Congressman Jones was Chairman of the Conference Committee and a floor manager of the bill.

> Mr. GERALD R. FORD. Mr. Speaker, this clarifies and certainly ought to wipe away any doubts anyone has. *The language is not a mandatory requirement for full obligation and expenditure up to the authorization figures in each of the 3 fiscal years.* (Emphasis added.)[24]

Senator Muskie's[25] explanation of the Harsha amendments on October 4, 1972, similarly stated that the amendments were intended only to grant obligational and expenditure flexibility and that the sums specified in Section 207 must be allotted, even though they need not be fully obligated:

> Under the amendments proposed by Congressman WILLIAM HARSHA and others, the authorization for obligational authority are "not to exceed" $18 billionover the next 3 years. Also, *"all" sums authorized to be obligated need not be committed, though they must be allocated.* These two provisions were suggested to give the Administration some flexibility concerning the *obligation* of construction grant funds. (Emphasis added.)[26]

It was with this understanding of the meaning and intent of the amendments that the Congress overwhelmingly passed the bill. The President evidenced a like understanding of the effect of Sections

[24]118 Cong. Rec. at H. 9123; *Legislative History* at 247.

[25]Senator Muskie is Chairman of the Senate Subcommittee on Air and Water Pollution (which reported the Senate version, S 2770), and he was the sponsor of the legislation, a floor manager and a member of the Conference Committee.

[26]118 Cong. Rec. at S 16871; *Legislative History* at 166.

205 and 207 when he vetoed the bill. He stated in his veto message that:

> Certain provisions of . . . [the bill] confer a measure of *spending discretion and flexibility* upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.
>
> But the law would still exact an unfair and unnecessary price from the public. For I am convinced . . . that the pressure for full funding under this bill would be so intense that funds approaching the *maximum authorized amount could ultimately be claimed and paid out*, no matter what technical controls the bill appears to grant the Executive. (Emphasis added).[27]

The President thus expressed a clear understanding that Sections 205 and 207, as amended by the conferees, only gave the Administrator "spending discretion and flexibility". The President realized that the sums specified in Section 207 had to be allotted and thus available for obligation. He was prompted to veto the bill by his fear that pressures to obligate available funds would overcome the Administrator's spending flexibility.

After the President's veto the conference amendment of Sections 205 and 207 were again discussed in both houses. On October 17, 1972 Senator Muskie reiterated that the sole intent and purpose of the amendments was

[27] 118 Cong. Rec. at S 18534 — S 18535 (Daily ed. October 17, 1972); *Legislative History* at 139.

to give the Administrator some flexibility concerning the *obligation* of the sums specified in Section 207 but that he must, in any event, allot those sums.[28] Congressman Harsha repeated his explanation of the amendments to the House on October 18, 1972.

> I want to point out the elimination of the word "all" before the word "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207 was intended to emphasize the President's *flexibility to control the rate of spending*.
>
> . . . .
>
> Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. *This is the pacing item in the expenditure of funds. It is clearly the understanding of the managers that under these circumstances, the Executive can control the rate of expenditures.* (Emphasis added.)[29]

[28] 118 Cong. Rec. at S 18546, S 18549; *Legislative History* at 116, 122. On January 31, 1973 Senator Muskie stated before the Senate Subcommittee on Separation of Powers that the Act mandated allotment of $5 billion and $6 billion in fiscal years 1973 and 1974 respectively. See generally, *Joint Hearings on Impoundment of Appropriated Funds by the President Before the Ad Hoc Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., 407-408 (1973). Because of Senator Muskie's important role respecting the passage of the Act, his statement, made so recently after enactment of the Act and directed to the construction in question, is entitled to great weight in interpreting the statute. *See, United States v. United Mine Workers of America*, 330 U.S. 258, 281-282 (1947); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 329-330 (1942).

[29] 118 Cong. Rec. at H. 10268 (Daily ed. October 18, 1972); *Legislative History* at 98. The use of the word "emphasize" by Congressman Harsha is an acknowledgement that his amendments were not intended to make a substantive change in the Act.

Congressman Harsha then explained the impact of the Act's funding provision in terms of expenditures in future fiscal years. In so doing, he demonstrated clearly that it was his understanding that Sections 205 and 207 required allotment of the full amount of the sum specified in Section 207:

> [T]he first major impact of the obligations from the $5 billion authorizations for the fiscal year ending June 30, 1973, is in fiscal year 1975. . . .
>
> As a matter of fact, for fiscal year 1973 if *all the money were obligated and placed under contract, there would only be $20 million needed to meet the obligations*. . . (Emphasis added.)[30]

Congressman Harsha's hypothetical presumed that the entire $5 billion would be available by allotment for obligation and was intended to emphasize to the House that the President's fear about "budget-wrecking" was unwarranted in view of the lag between the "obligation" of funds and the time when they would actually be spent. Senator Muskie made the same point to the Senate the day before, when he noted that the full $18 billion authorized by the Act probably would not be spent until the end of fiscal year 1979.[31]

The statements of these legislators, as the creators of the Act, are of controlling weight in interpreting the meaning, intent and purpose of Section 205 and 207. *See, e.g., First National Bank of Logan, Utah v. Walker Bank and Trust Co.*, 385 U.S. 252 (1966); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951); *Pan American World Airways, Inc. v. Civil*

[30] *Id.*

[31] 118 Cong. Rec. at S 18547 (Daily ed. Oct. 17, 1972); *Legislative History* at 119.

Aeronautics Bd., 380 F.2d 770, 779-782 (2nd Cir. 1967); *aff'd per curiam sub nom., World Airways, Inc. v. Pan American Airways, Inc.*, 391 U.S. 461 (1968). These members of the House and Senate Public Works Committees were fully familiar with the funding mechanism of the Act. They knew the difference between allotment, obligation, and expenditure and cannot be assumed to have used these words loosely or inadvertently. It is especially significant, moreover, that on October 18, 1972, after the President's veto and veto message, Congressman Harsha expressed an understanding that the Act mandated the allotment of the full amount of the sums specified in Section 207. As sponsor of the amendatory language upon which Defendant has relied to reduce allotments, Congressman Harsha's understanding is particularly persuasive. *See, National Labor Relations Bd. v. Fruit & Veg. Pack. & Whse., Loc. 760,* 377 U.S. 58, 66-67 (1964).

There emerges only one interpretation of Sections 205 and 207. The Administrator *must allot* among the States $5 billion in fiscal year 1973, $6 billion in fiscal year 1974 and $7 billion in fiscal year 1975[32]. He may,

[32] Former EPA Administrator Ruckelshaus candidly recognized, after he left EPA, that this was his interpretation of what Congress had intended:

> I think this was the intention of Senator Muskie and others when the law was passed— get out of the business of having to draw up priorities with various projects, and be able to say they can fund them all at once. I also recognize it is very frustrating to the States, that they have to go through this priority process again when they felt they were out of it, as a result of the amount of funding.

Joint Hearings on Impoundment of Appropriated Funds by the President before the Ad Hoc Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., at 418 (1973).

however, in the exercise of his discretion to approve construction project plans, specifications and estimates under Section 203, *control the rate of obligation* of those allotted sums and hence the rate of expenditures resulting from such obligations. This obligational and expenditure flexibility is the only discretion afforded the Administrator with regard to the sums specified in Section 207.

Even at the contract approval stage, however, the Administrator may not refuse to obligate funds on the grounds unrelated to the Act. The most instructive authority on this point is the Eighth Circuit's well-reasoned opinion in *State Hwy. Comm'n of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), not only because it involved the Federal-Aid Highway Act,[33] expressly acknowledged by Congress as the model for Title II of the Act,[34] but because the reason for the impoundment was the need to control inflationary pressures.

In that case the Secretary of Transportation had apportioned (allotted) the total sum authorized to be appropriated[35] but had imposed "contract controls" forbidding actual obligation of the full amount so apportioned. The State Highway Commission of Missouri brought suit seeking to compel the Secretary

[33]23 U.S.C. § 101, *et seq.* (1964).

[34]118 Cong. Rec. H 2506 (Daily ed. March 27, 1972); *Id.* at S 16872 (Daily ed. Oct. 4, 1972); *Legislative History* at 367, 368.

[35]*See*, 23 U.S.C. § 104(b) (1964).

to rescind the controls and to release the funds. The trial court held for the plaintiff[36] and the Eighth Circuit affirmed. In so doing, the court of appeals analyzed the whole act to discern its intent and purposes and concluded that:

> To reason that there is implicit authority within the Act to defer approval for reasons totally collateral and remote to the Act itelf requires a strained construction which we refuse to make. It is impossible to find from these specific grants of authority discretion in the Secretary to withhold approval on projects Congress has specifically directed because of a system of priorities the Executive chooses to impose on all expenditures. The Congressional intent is that the Secretary may exercise his discretion to insure that the roads are well constructed and safely built at the lowest possible cost, all in furtherance of the Act, but when the impoundment of funds impedes the orderly progress of the federal highway program, this hardly can be said to be favorable to such a program. In fact it is in derogation of it. It is difficult to perceive that Congress intended such a result. *State Hwy. Comm'n of Missouri v. Volpe*, 479 F.2d at 1114 (8th Cir. 1973).

Likewise in the instant case Congress cannot be presumed to have intended to permit the Administrator to disapprove a construction project because of considerations related to inflation. As made plain earlier, Congress knew of the Administration's objections to the funding provisions of the Act and by overriding the veto, Congress reiterated its

[36]*State Hwy. Comm'n of Missouri v. Volpe*, 347 F. Supp. 950 (W.D. Mo. 1972).

Despite the legislative history cited above, a district court, in dicta, has concluded that the allotment phase was discretionary. *Brown v. Ruckelshaus*, 364 F. Supp. 258, 268 (C.D. Cal. 1973). But to reach this conclusion the court examined legislative history referring only to discretion at the obligation phase--a proposition not even at issue. While legislative history supports the Administrator's position in *Brown* that not every penny must be spent in any given year, the history does not support the conclusion that allotment is discretionary.

Another district court found discretion based on the act of deletion--what the court termed "syntactical history." *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689, 698-99 (E.D. Va.), remanded with directions *sub nom. Campaign Clean Water, Inc. v. Train*, 489 F.2d 492 (4th Cir. 1973). In the presence of what the court felt to be an unclear legislative history subjecting the Act to two interpretations, this "syntactical history" was found to be persuasive. However, no substantiation was offered as to what the "syntactical history" of the deletion was, only ex post facto commentary. If legislative history is unclear, "syntactical history" is nonexistent. Nevertheless, Judge Merhige declares this deletion to be the principal source for concluding that Congress intended the Administrator to exercise some discretion with respect to allotments. The weight of opinion is, however, in disagreement with Judge Merhige's conclusion.[9] The mere removal of a word is subject to many interpretations and is of itself not sufficient to support a major deviation from the plain meaning and legislative history of a statute.

[9] New York v. Train, 494 F.2d 1033 (D.C. Cir. 1974); Texas v. Fri, No. A-73-CA-38 (W.D. Tex., Oct. 2, 1973); Marén-Trigona v. Ruckelshaus, No. 72-3044 (N.D. Ill., June 29, 1973); Minnesota v. USEPA, No. 4-73 Civ. 133 (D. Minn., June 25, 1973), *appeal argued*, Civ. No. 73-1446, 8th Cir., Feb. 13, 1974. *But see* Brown v. Ruckelshaus, 364 F. Supp. 258 (C.D. Cal. 1973) (dicta).

In sum, a combination of circumstances indicates the mandatory nature of allotment. First, no legislator directly refers to allotments as discretionary. Those who supported discretion in allotment, if there were any, did *not* express their opinion;[10] and were unable to pass any language explicitly discretionary. Third, one of the principal sponsors, Senator Muskie made a direct statement that the deletion of "all" did not affect the mandatory allotment provision. Fourth, the plain meaning and statutory history support mandatory allotment and discretionary obligation. The total impact of these circumstances clearly shows allotment to be mandatory. Both the legislative history, which clearly supports the mandatory nature of allotment, and the plain meaning of the words of the allotment provision admit of no reasonable interpretation other than a mandatory allotment provision.

3. STATEMENTS IN LEGISLATIVE HISTORY REFERRING TO AUTHORITY TO "IMPOUND" CONFER NO AUTHORITY TO REDUCE ALLOTMENTS.

The Administrator contends that certain excerpts from the legislative history indicate that the power to impound authorized funds was conferrred upon the Executive. Brief for Petitioner at 14 *et seq.* The contention is unsupported, first because these cited statements refer to discretion only at the post-allotment phase (obligation) and, second, because any reference to Office of Management and Budget's authority to impound is inapplicable in the instant case.

The Administrator contends that the quoted language confers a general power to impound independent of the Act Brief for Petitioner at 10, 44. The primary thrust of this argument depends upon Representative Harsha's statement

[10] "The silence of sponsors of amendments is pregnant with significance." NLRB v. Fruit & Veg. Packers, Local 760, 377 U.S. 58, 66 (1964).

comparing impoundment under the Highway Trust Fund with impoundment under the Act. Brief for Petitioner at 17. Congressman Harsha stated:

> Surely, if the administration can impound monies from the highway trust fund which does not have the flexibility of the language of the water pollution control bill, it can just as rightly control expenditures from the contract authority produced in this legislation by that same means.

118 CONG. REC. H9122 (daily ed. Oct. 4, 1972). Although the statement indicates a conferring of control over spending power, the only power exercised by the Executive in the Highway Trust Fund to which Representative Harsha refers occurs at the obligation phase with "contract controls." *See State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1103-04 (8th Cir. 1973). In fact, the Executive and the Eighth Circuit have recognized that the Highway Trust Fund's "allotment" process is ministerial. *See* p. 29-30 *infra*.

The Administrator also infers a general power to impound from other statements referring to the Office of Management and Budget.[11] Even if the OMB has adequate impoundment power under the Anti-Deficiency Act, the OMB has failed to utilize any option which might exist. In OMB's report of February 19, 1974, pursuant to the Federal Impoundment and Information Act, 31 U.S.C.A. §581c-1 (Supp. 1974), it omitted the withheld allotments from its list of impoundments. 39 Fed. Reg. 7707, 7708 (1974). Since none of the present withholding was accomplished through

[11]Senator Nelson stated:

> Only if the President's Office of Management and Budget or the Congress specifically directed otherwise would the money not be available at the levels in the legislation, according to my understanding.

118 CONG. REC. S16888 (daily ed. Oct. 4, 1972).

any OMB authority, the Administrator may not rely upon powers vested in the President through the OMB. Consequently, any references to OMB "impoundment" are inapplicable since that power, whether or not it exists, has not been exercised.

Further, even if the OMB had utilized its power to reserve under the Anti-Deficiency Act, 31 U.S.C. §665 (c) (1970), that action would have exceeded their authority. Reserves cannot contravene the intent of the Congress. In a report to the Senate Appropriations Committee recommending reserves, the Bureau of the Budget and the Comptroller General stated that there was a need "for machinery to conserve appropriations which are in excess of *actual requirements*."[12] This emphasizes that the purpose was not to allow the reserving of required funds.

In another report, prepared by the House Appropriations Committee to accompany the 1950 amendments to the Anti-Deficiency Act, the following discussion stemmed from consideration of President Truman's impoundment of Air Force funds:[13]

> It is perfectly justifiable and proper for all possible economies to be effected and savings to be made, but there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds.

Even more persuasive is the Bureau of the Budget Examiner's Handbook written in 1952, shortly after the 1950 amendments to the Anti-Deficiency Act, which stated:

[12]Quoted in *Joint Hearings on S.373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 107 (1973) (emphasis added).

[13]H.R. REP. NO. 1797, 81st Cong., 2d Sess. 311 (1951).

"Reserves must not be used to nullify the intent of Congress with respect to specific projects or level of programs."[14] The decision of the Eighth Circuit in *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1118 (1973), reaffirmed these interpretations and considered the Anti-Deficiency Act as no justification for "violating the purposes and objectives of the particular appropriation statute."

A withholding of the magnitude accomplished by the Administrator in the instant case, if done by reserving, would be an encroachment on congressional intent and would be outside the purview of the Anti-Deficiency Act. However, as previously stated, this question is not directly before the Court since the refusal to allot was by the Administrator and not the OMB. Consequently, all references to legislative history which are argued as granting impoundment authority regarding allotment either refer to another phase of the Act (obligation) or to unexercised OMB reserve authority.

B. EXPRESS GOALS AND OVERALL FUNDING STRUCTURE OF THE ACT DEMONSTRATE THAT ALLOTMENT OF AUTHORIZED SUMS IS MANDATORY.

> [The Act] has received more thorough consideration and has engendered more productive discussion than any other in which I have participated during my service in the Senate.

118 CONG. REC. S16881 (daily ed. Oct. 4, 1972) (remarks of Senator Cooper). Since a determination of the manditoriness of

[14] U. S. BUREAU OF THE BUDGET, EXAMINER'S HANDBOOK (1952) (quoted by J.Williams, *The Impounding of Funds by the Bureau of the Budget* (1955) cited in *Joint Hearings on S.373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm on the Judiciary*, 93d Cong., 1st Sess. 844, 859 (1973)).

allotment affects the entire Act, it is necessary to examine allotment in the context of the other relevant provisions of the Act. The Act, as Senator Cooper points out above, was carefully constructed. However, if allotment is considered discretionary, this well-planned Act reaches illogical results. Congressional enactments "should never be construed as establishing statutory schemes which are illogical, unjust or capricious." *Lee Fook Chuey v. Immigration & Naturalization Serv.*, 439 F.2d 244, 249 (9th Cir. 1970).

The logic and goals of the entire Act are essential in interpreting the allotment provision. As the Court observed in *Richards v. United States*, 369 U. S. 1, 11 (1962):

> We believe it fundamental that a section of a statue should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." (footnotes omitted).

Statutory construction and the legislative history of the Act cannot exist independently or in a vacuum.

> We are not only dealing with the language of the statute, but we must look as well to the logic of Congress and the broad national policy which was evidenced by its enactment.

Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 353 (5th Cir. 1968).

The Eighth Circuit reaffirmed this principle in *State Highway Comm'n v. Volpe*, citing *Richards* and Lord Campbell's statement of over a century ago that:

> [i]t is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the *whole scope* of the statute to be construed.

Liverpool Borough Bank v. Turner, 45 Eng. Repr. 715, 718

(1860), *aff'd* 70 Eng. Repr. 703, as quoted in 479 F.2d 1099, 1112 (8th Cir. 1973) (the court's emphasis).

Thus, an examination of the goals of the Act as well as its other provisions and internal logic is necessary in construing the allotment provision.

1. GOALS OF THE ACT EXPRESS A NATIONAL COMMITMENT OF FUNDS TO RESTORE THE WATERS OF THE UNITED STATES.

> Sec. 101 (a). The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective, it is hereby declared that, consistent with the provisions of this Act -- (1) It is the national goal that the discharge of pollutants . . .be eliminated by 1985 . . . .
>
> . . . . .
>
> Sec. 201 (a). It is the purpose of this title to *require* and to assist the development and implementation of waste treatment management plans and practices which will achieve the goals of this Act. (emphasis added).

In the debate prior to the override of the Veto, Senator Muskie stressed that "[t]he whole intent of this bill is to make a national commitment" of funds to solve our problems in water pollution. 118 CONG. REC. S18547 (daily ed. Oct. 17, 1972). Congressman Harsha in the House debate on the Conference Report noted that "[t]he objective of this legislation is to restore and preserve for the future the integrity of our Nation's waters." 118 CONG. REC. H9117 (daily ed. Oct. 4, 1972). In his 1970 State of the Union message, President Nixon recognized the immediate necessity of the national commitment "to put modern municipal waste treatment plants in every place in America where they are needed to make our waters clean again . . . ." 116 CONG. REC. 740 (1970). Although the Act is not the program proposed by the President, the goals of his program were the same as those of the Act, except for the

amount and methods of funding. In his veto message, the President stressed, "My proposed legislation, as reflected in my budget, provided sufficient funds to fulfill that *same intent* . . . ." 118 CONG. REC. S18534 (daily ed. Oct. 17, 1972) (emphasis added).

Congress overrode that veto to implement the well-recognized and undisputed goals of the Act. Moreover, if the Administrator's action is upheld in the instant case, the effect would be to legitimize, or constructively "legislate," the funding levels suggested by the President in his bill. These lower levels were explicitly rejected by Congress upon its adoption of the Act and its subsequent override of the President's veto. It was clear that Congress wanted to compel the higher level of funding.[15]

There were other indications that Congress wanted to make the full amount available to the states. Early in the consideration of the Act, congressional proponents advocated avoiding the normal method of funding which requires approval by the appropriations committees.[16] The argument advanced was that funding levels had been continually reduced by the

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[15] "[T]he confereees are convinced that the *level of investment that is authorized is the minimum* dose of medicine that will solve the problems we face." 118 CONG. REC. S16871 (daily ed. October 4, 1972) (remarks of Senator Muskie) (emphasis added). "Contract authority is provided for up to $5 billion in 1973, $6 billion in 1974, and $7 billion in 1975. *This will be allocated to the States on the basis of the Environmental Protection Agency's annual assessment of needs established without regard to budgetary limitations and other nonwater quality factors.*" *Id.* at S16881 (remarks of Senator Cooper) (emphasis added). "The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation, and specifically studying how much money would be necessary to achieve the objective and goals of the act, as set forth in section 101 (a) . . . ." 118 CONG. REC. S18548 (daily ed. October 17, 1972) (remarks of Senator Muskie).

[16] See n.2 *supra*. and p. 23-24 *infra*.

appropriations committees below the authorized level -- a common occurrence.[17] Thus, contract authority was utilized to insure that full amounts authorized would be made available for obligation,[18] a purpose which would be frustrated by permissive allotments.

Provisions of a statute should not be interpreted to frustrate the goals of Congress regarding funding levels. As expressed by the lower court in the instant case:

> We find that it was Congress' intention that the full $18 billion be spent to control water pollution .... [T]he legislative history...manifests an intent to create a procedure which would insure that the total authorized funds would be made available to states. It is this goal which must guide us in interpreting the funding mechanism, for if discretion in allotment would make the achievement of this goal more difficult, it must be assumed that Congress intended no such authorization.

New York v. Train, 494 F.2d 1033, 1042 (D.C. Cir. 1974). The Act clearly contemplates full expenditure of funds to implement the goal of cleaning the nation's waters.[19]

[17] Under normal budgetary procedures, appropriations are often made at a level lower than authorizations. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE GAP BETWEEN FEDERAL AID AUTHORIZATIONS AND APPROPRIATIONS, FISCAL YEARS 1966-1970 (1970).

[18] "[L]et us put up the Federal share in a way, with language and an understanding, that makes it clear we are not backing off." 117 CONG. REC. S17446 (daily ed. Nov. 2, 1971) (remarks of Senator Muskie).

[19] If the Administrator's argument were to be accepted, he could conceivably "control" allotment to $0; it is worth considering the fate of this program at the Administrator's present rate of allotment. Senator Muskie estimated that even with full allotment, it would take seven years to expend the $18 billion. 118 CONG. REC. S18547 (daily ed. Oct. 17, 1972). At the Administrator's present 45% rate of allotment, the optimum time for expenditure of the full $18 billion is approximately 15 years.

2. PERMISSIVE OR MULTIPLE ALLOTMENTS WOULD FRUSTRATE THE INTENT OF THE ACT TO ENCOURAGE LONG RANGE PLANNING.

The Administrator asserts authority to allot funds for any given year at any time and that "there is no practical difference in result between exercising such control at the allotment or at the obligation stage." Brief for Petitioner at 23. Neither the contention for multiple allotments nor the assertion that there is no practical difference is supportable.

Nowhere in the Act is there provision for multiple allotments or disposition of funds authorized but not allotted. On the other hand, section 205 (b) (1) of the Act deals extensively with the reallotment of funds allotted but not obligated. The inference is that incomplete obligation was anticipated by Congress, but incomplete allotment was not.

The Administrator has adopted the position that funds not allotted will be available for obligation indefinitely. Brief for Petitioner at 25 *et seq.* However, there is no support for such a contention in the Act, and the idea that the Administrator may absolutely control release of unallotted funds forever by multiple allotments is plainly unreasonable.

One of the primary problems with the Federal Water Pollution Control Act of 1956 was that its yearly appropriation scheme caused uncertainty because of its failure to give notice to the states of future federal commitments. The appropriation method was deemed neither practical nor economical. 117 CONG. REC. S17445-52 (daily ed. Nov. 2, 1971).

Contract authority,[20] the new method incorporated in section 203 of the Water Pollution Control Act Amendments of 1972, was designed to allow flexibility in the planning stage and give long range assurances to the states and local agencies that the funds were available in the amount specified by Congress. Representative Harsha stressed that:

> It is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants ....

118 CONG. REC. H2727 (daily ed. March 29, 1972); *see* 117 CONG. REC. S17451 (daily ed. Nov. 2, 1971) (remarks of Senator Muskie). The District of Columbia Circuit Court stated simply, "[t]he Act was passed to insure that ultimate grantees could rely in advance on the amounts available." *New York v. Train*, 494 F.2d at 1036-37. In *Texas v. Fri*, No. A-73-CA-38, Slip Op. at 5 (W.D. Tex., Oct. 2, 1973), the district court saw the same issue to be one of logic:

> The feeling was that without unequivocal federal financial commitment state and local governments would have difficulty entering into long term contracts and financing long term bonds. *It is illogical* to think that Congress would inject the same uncertainty back into the system it had sought to avoid with the allotment procedure by giving the Administrator discretion to choose the amount to be made available to the state and local governments. (emphasis added).

[20] With a "contract authority" method of funding, Congress authorizes an amount to be committed by the Administrator according to conditions and limitations specified by law. The actual appropriation of funds by Congress is *pro forma* and takes place after obligation of funds by the Administrator. *See* 117 CONG. REC. S17445-52 (daily ed. Nov. 2, 1971); U. S. OFFICE OF MANAGEMENT & BUDGET, CIRCULAR NO. A-34, INSTRUCTIONS ON BUDGET EXECUTION §21.1, at 6 (1971).

Exercise of discretion at the allotment phase clearly precludes effective long range planning by states and localities -- a primary goal of the Act. Exercise at the obligation phase would not hinder planning but would control the rate of expenditure to qualified applicants. Consequently, the Administrator's contention that there is no practical difference in exercise of discretion at obligation or allotment is fallacious. Exercise of discretion through multiple allotment frustrates one of the primary goals of the Act -- long range planning by states.

Moreover, the Administrator argues for discretion at both the allotment and obligation phases. Brief for Petitioner at 23. This would result in almost total uncertainty about the level of funding, and render long range planning impossible.

3. THE INTERNAL LOGIC OF THE ACT READ WITH THE REALLOTMENT PROVISION, SECTION 205 (b), INDICATES ALLOTMENT TO BE MANDATORY.

Under section 205 (b), budget authority allotted but unobligated after an initial thirty-month period is redistributed by reallotments to the states and continues to be available for obligation. Reallotment of unobligated funds thus permits a constant level of funding to continue to be available to the states in order to facilitate the accomplishment of the goals of the Act. If unallotted, however, the funds are never available for reallotment or obligation and therefore are permanently lost to the states.[21] *See New York v. Train*, 494 F.2d at 1049.

[21] The Act requires the Administrator to make allotments by a fixed date under section 205 (a). Once properly allotted, section 205 (b) (1) requires:

> Any sums allotted to a State . . . shall be available for obligation . . . in such State for a period of one year after the close of the fiscal year for which such sums are authorized.

Thus, since subsection (b) (1) is the exclusive provision for obligational availability and since it specifies a definite obligational period, *see* 31 U.S.C. §701 (b), any amounts unallotted by the statutory date are never available for obligation and consequently lapse. *See* 31 U.S.C. §701 (a) (2). Further, these same unallotted sums can not be reallotted since only those amounts allotted by the statutory date may be reallotted under section 205 (b) (1).

The reallotment procedure, read together with a mandatory allotment provision, supports the policy of the Act to encourage planning. It is well established that separate provisions of a single act should be interpreted so as to reach the " 'most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973). Finding allotment permissive would clearly frustrate the overall purpose of the Act.

4. SECTION 206 (f) (1), WHICH PROVIDES FOR ADVANCE OBLIGATION OF FUNDS AUTHORIZED FOR FUTURE ALLOTMENTS, IS MEANINGLESS UNLESS ALLOTMENT IS MANDATORY.

Section 206 (f) (1) allows the Administrator to obligate funds in advance for a state's particular project, even if the funds allotted for that fiscal year have been fully obligated. This is possible only if the authorization for the subsequent fiscal year will ensure payment of the obligation incurred. If a state may not be sure of the level of future allotments, as would be the situation with permissive allotment, this provision is meaningless.

The proposition is well established that a statute must be construed, if at all possible, to give effect to all its provisions. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955). As the D.C. Circuit has observed:

> Section 206 (f) (1) would have scant operative effect if the "state's expected allotment" could not be known because the Administrator had discretion to allot only a portion of such authorization. This is further evidence of a legislative purpose to make allotment mandatory.

New York v. Train, 494 F.2d at 1049-50.

Mandatory allotment allows the Administrator to use his discretion as to individual projects and to exercise control over the obligation and rate of expenditure of funds without jeopardizing the level of funding available. The reallotment provision was provided by Congress to allow the Administrator to use discretion at the *obligation phase* without raising the danger that states would have insufficient time to obligate deferred projects. *Cf. State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1114-15 (1973).

The Administrator argues that funds currently unallotted will not be lost to the states because section 205 is not a once-a-year action. Section 205 states:

> *the* allotment for fiscal year 1973 shall be made not later than .... (emphasis added).

This provision obviously contemplates only an annual allotment. A system allowing more than one allotment would wreak havoc with state planning. States must plan to accomplish the maximum within the amounts allotted. The January allotment for a fiscal year and the carryover to the next fiscal year gives the states time to plan how best to attain their goals. These proposed mid-way allotments do not give the states adequate notice or time to plan the efficient use of funds. In many cases, it would be impossible for a state to expand a program after it is started. Plans or specifications would have to be redrawn, and the program would have to be resubmitted to the Administrator. If approved, bids would have to be relet. This system is not only inefficient but clearly contrary to the intent of Congress.

The District of Columbia Circuit Court reached the same conclusion and observed, "the Act nowhere mentions any type of later augmentation procedure" for additional allotments. *New York v. Train*, 494 F.2d at 1049. Therefore, the loss of funds resulting from the reallotment procedure when allotment is read to be permissive cannot be cured by secondary allotments not permitted by the Act.

5. THE OBLIGATION PROVISION AS WRITTEN INDICATES THAT THE OBLIGATIONAL PHASE RATHER THAN THE ALLOTMENT PHASE IS DISCRETIONARY.

Section 203 sets the general scheme for contract authority and requires applicants to submit plans and specifications after allotment. Approval is based upon satisfying the grant conditions specified in section 204. Only if discretion is present at the obligation phase rather than at the allotment phase can the Administrator intelligently exercise his discretion.

At this point, after allotment and the submission of plans, the Administrator has at his disposal the information necessary to evaluate specific projects and the needs of states -- information not available at the allotment phase. Therefore, the Administrator can better decide upon reductions or delays which least damage the goals of the Act.

Discretionary allotment would hamper effective operation of the obligation phase by precluding the exercise of informed discretion. If a statute is susceptible to either of two opposed interpretations (in the instant case either mandatory or discretionary allotments), the statute must be read "in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro v. United States*, 335 U.S.1, 31 (1948). Consequently, the allotment provision should be read as mandatory to promote the purpose of advance planning and informed exercise of discretion.

C. ALLOTMENT IS A BUDGETARY MECHANISM WHICH IS BOTH GENERALLY MANDATORY AND SPECIFICALLY MANDATORY IN THE CONTEXT OF THE ACT.

Petitioner's argument that allotment is discretionary fails to take cognizance of the characteristics of allotment as a budgetary tool. Allotment in the Act is a technical process in the implementation of contract authority. The amount each state

is allotted is determined by the "ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States." Section 205 of Pub. L. No. 92-500, 86 Stat. 816. *See also* Shinn, *The Federal Grant Program to Aid Construction of Municipal Sewage Treatment Plants: A Survey of the 1972 FWPCA Amendments*, 48 TUL. L. REV. 85, 88 (1973). The Administrator then determines, through the obligation phase, the extent of the actual needs of the states. Allotment provides a ceiling within which the Administrator may exercise informed discretion by evaluating proposals from the states.

Allotment has been found ministerial in other spending enactments. In *Udall v. Wisconsin*, an action involving allocation of wildlife restoration funds to states, the court found the Secretary of the Interior was "given no discretion in the initial apportionment." 306 F.2d 790, 793 (D.C. Cir. 1962), *cert. denied*, 371 U. S. 969 (1963). Apportionment in *Udall* is the same as allotment in the instant case. The *Udall* court also recognized that there was discretion later in the funding process: "approval or disapproval of a conservation project submitted by a state . . .involves an administrative judgement . . . ." 306 F.2d at 793 n.15. The same discretionary role is played by obligation in the instant case.

Also indicative of the nature of allotment in the instant case is the practice of "apportionment" in the Federal-Aid Highway Act. 23 U.S.C. §§ 101 *et seq.* (1970). The Conference Report accompanying the Water Pollution Control Act specifically refers questions on the interpretation of the mechanics of contract authority funding to the Federal-Aid Highway Act. H.R. REP. NO. 1465, 92d Cong., 2d Sess. 111 (1972). Further, the Administrator, in his brief, recognized congressional

references to the procedures of the Highway Act. Within the meaning of the Highway Act, apportionment is a ministerial function -- the Secretary of Transportation has no discretion. "Apportionment" by the Secretary among the states according to a set formula is exactly the same as allotment. As the Eighth Circuit Court of Appeals observed:

> [T]he Secretary is required to apportion among the several states certain sums authorized to be appropriated for expenditure.

State Highway Comm'n v. Volpe, 479 F.2d 1099, 1107 (8th Cir. 1973). As authority for the above statement, the Eighth Circuit cited former Federal Highway Administrator F. C. Turner, who observed that:

> There is absolutely no discretion of any kind in our office with respect to how much any State gets in any of these categories of funds [pursuant to the formula]. The apportionment is specified in the law and we distribute it right to the dollar.

Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 80 (1971), as quoted in *State Highway Comm'n v. Volpe*, 479 F.2d at 1107 n.8. The District of Columbia Circuit Court directly concurred in the conclusion of the *Volpe* court that "allotment" under the Highway Act is mandatory.

> "[I]mpoundment" under the Federal-Aid Highways Act is achieved only by the limiting of contracts awarded (*i.e.* obligation). There is *no possibility under that Act to reduce at the "allotment" stage.*

New York v. Train, 494 F.2d at 1046-47 (emphasis added). The conferees' reference to the mechanics of the Highway Act is strong indication that they expected allotment to be mandatory.

At least four federal district courts and the District of Columbia Circuit Court of Appeals have held that allotment in the Water Pollution Control Act is a non-discretionary, administrative procedure.[22]

[22] In the lower federal court which tried the instant case, the district court held:

> [t]he language of the pertinent sections of the Act, read in the light of their legislative history, clearly indicates the intent of Congress to require the Administrator to allot, at the appropriate times, the full sums authorized to be appropriated by §207.

358 F. Supp. at 679 (D. D.C. 1973). This opinion was affirmed by the District of Columbia Circuit:

> [B]elieving as we do that there is a clear distinction under the Act between allotment and obligation and that there can be *no discretion* as to the former, we find it unnecessary to consider whether an allotment could be "augmented" in a later fiscal year; full allotment must be made in each fiscal year.

New York v. Train, 494 F.2d at 1049. In *Texas v. Fri*, the district court found:

> in light of the high priority placed by Congress on the Act, the language of the Act, and the legislative history of the Act, this Court concludes that the Administrator has a mandatory duty to allot to the Plaintiffs the sums authorized by Congress in §207 of the Act in accordance with §205 (a).

No. A-73-CA-38, Slip Op. at 5-6 (W.D. Tex., Oct. 2, 1973), *appeal argued*, No. 73-3965, 5th Cir., April 29, 1974. In *Minnesota v. USEPA*, it was held:

> In failing to allot all of the money authorized in this matter, the Administrator is acting in express violation of the purposes of the Act itself as well as in violation of the purposes of the Act as set forth by Congress.

No. 4-73 Civ. 133, Slip Op. at 13-14 (D. Minn., June 25, 1973), *appeal argued*, Civil No. 73-1446, 8th Cir., Feb. 13, 1974. Also, in *Florida v. Train*, the district court stated:

> In view of the legislative history behind the Act and the goals sought to be achieved by the Act it is illogical to believe that Congress accorded the Administrator discretion at the allotment stage.

No. 73-156, Slip Op. at 6 (N.D. Fla., Feb. 25, 1974), *appeal argued*, Civil No. 73-3965, 5th Cir., Apr. 29, 1974.

As these cases have recognized, the function of allotment is merely to parcel out the authorization and is not tantamount to expenditure by the Federal Government. The general utilization of allotment as a ministerial procedure to divide funds among the states rebuts the Administrator's contention that allotment is discretionary.

D. EVEN IF DISCRETION IS FOUND, THE ADMINISTRATOR'S ACTION IN WITHHOLDING FIFTY-FIVE PERCENT OF AUTHORIZED FUNDS WAS AN ABUSE OF DISCRETION IN LIGHT OF THE EXPRESSED GOALS OF THE ACT.

The district court in *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689 (E.D. Va. 1973), determined that the allotment phase of the Act confers discretion on the Administrator. On appeal to the Fourth Circuit, neither party sought review of the district court's finding of discretionary allotment. In fact, the Fourth Circuit made emphatic declarations that the issue of whether allotments were mandatory was not before them. *Campaign Clean Water, Inc. v. Train*, 489 F.2d 492, 497 (4th Cir. 1973). Most courts have found allotment mandatory.[23] However, even if the Court held allotment discretionary, the actions of the Administrator constitute a *per se* abuse of discretion and are reviewable by the Court. If allotment is held to be non-mandatory, then the issue is whether the Administrator's decision to allot only 45% of the authorized amount constituted a *per se* abuse of discretion.

The standards as contained within the Act show that 45% allotment is a *per se* abuse of any arguable discretion since the goals of the Act cannot be accomplished at this rate of allotment. The purpose of establishing contract authority as the method of funding was to facilitate state planning. A cut of 55% in the amount of the funds allotted inhibits the ability of the

[23] *See id.*

states to plan and thus frustrates the intent of Congress. As a result of the Administrator's actions the states are unable to make long range plans, with the result that the cities are unable to determine the amount of funding they will receive from the state. *See* p. 24-25 *supra*.

As previously stated, the amount allotted was deemed by Congress to be the "minimum amount needed" to attain the goals of the Act. *See* 118 CONG. REC. S16870-71 (daily ed. Oct. 4, 1972) (remarks of Senator Muskie). Therefore, a cut of more than half the funds, before the Administrator has evaluated any state plans or surveys, cannot be made without completely frustrating the goals of the Act; and frustrating the goals of the Act is not a power within the discretion of any administrator.[24] In order for the goals of the program to be accomplished by 1985 it is essential that the states know how much money is available for which they can attempt to qualify.

In reviewing the Administrator's actions the Court must consider "whether the decision was based on a consideration of the relevant factors . . . ." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). On November 22, 1972, President Nixon announced that the amounts allocated under the Act would be considerably reduced from the amounts authorized. This announcement was made prior to any administrative examination of proposed state plans or surveys and therefore apparently was not based on relevant water quality factors. In fact, the expressed justification was not based on water quality factors:

> These amounts will provide for improving water quality and yet give proper recognition to competing national priorities for our tax dollars, the resources now available

[24] Even if discretion is available, allotting 45% of the authorization is a per se abuse of discretion since the 1973 "Needs Survey" indicates that the states presently need at least 60 billion dollars to implement their plans. USEPA, *Report to the Congress: Costs of Construction of Publicly-Owned Wastewater Treatment Works* A-2, B-1 (1973).

> for this program and the projected condition of the Federal treasury under existing tax laws and the statutory limit on the national debt.

Letter from President Nixon to William D. Ruckleshaus, EPA Administrator, November 22, 1972, reproduced in *Hearings on Federal Budget for 1974 Before the House Comm. on Appropriations*, 93d Cong., 1st Sess. 194-95 (1973); see Brief for Petitioner at 44. Further, the Administrator directly states in his brief that he may exercise allotment discretion "in the interest of overall government fiscal policies that are not related to the particular program involved." Brief for Petitioner at 10.

Fiscal considerations are the same rationale used by President Nixon in vetoing the water bill. While an acceptable reason for veto, fiscal considerations are unrelated to the implementation of the Act itself. Such extrinsic considerations were attacked in *State Highway Comm'n v. Volpe*, 479 F.2d 1009, 1114-15 (8th Cir. 1973):

> We find nothing within these provisions of the [Highway] Act which explicitly or impliedly allows the Secretary to withhold approval . . .for reasons remote and unrelated to the Act.
>
> . . . .
>
> When the provisions of the Federal-Aid Highway Act are considered as a whole, it is apparent that the Secretary does not have the authority to withhold funds for anti-inflationary purposes.

The statute in the instant case does not contain provisions for withholding for the purpose of controlling inflation. The court in *State Highway Comm'n v. Volpe*, 479 F.2d at 1114, stated that:

> It is impossible to find from these specific grants of authority discretion in the Secretary to withhold approval on projects Congress has specifically directed because of a system of priorities the Executive chooses to impose on all expenditures.

It is clear that the decision not to allot 55% of the funds authorized is an abuse of discretion, since it cannot be shown that the President's decision was based on a consideration of factors relevant to implementation of the program. In sum, the withholding in the instant case would be a *per se* abuse of any available discretion for two reasons. First, the 55% withholding totally frustrates the purposes of the program and secondly the reasons for impounding were irrelevant considerations.

II. REFUSAL TO ALLOT FIFTY-FIVE PERCENT OF THE AUTHORIZED FUNDS IS OUTSIDE THE CONSTITUTIONAL AUTHORITY OF THE EXECUTIVE BRANCH.

A finding on constitutional authority is not imperative to render a decision in the instant case since an order could be issued to the Administrator to follow mandatory provisions of the Act and, given compliance, there would be no necessity to hold on a constitutional basis.[25] However, impoundment is a pervasive issue which has given rise to extensive litigation. Further, the President[26] as well as his spokesmen[27] have directly asserted the constitutional authority to impound. An opinion from the Court on the constitutional framework for impoundment would therefore prove valuable as a guideline to lower courts. However, it should be noted that the newly enacted Budget and Impoundment Control Act of 1974 may have a profound effect on the impoundment issue and assertions of constitutional authority.[28]

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[25] However, the Administrator does allude to the constitutional authority of the President to control expenditures. Brief for Petitioner at 12.

[26] *See* note 39 *infra*.

[27] *Id.*

[28] *See* note 71 *infra*.

A. THE "FAITHFULLY EXECUTE" CLAUSE OF THE CONSTITUTION DOES NOT ACCORD DISCRETION TO REFUSE TO IMPLEMENT CONGRESSIONAL ENACTMENTS.

The Executive argues that the "faithfully execute" clause confers the right to selectively enforce or "harmonize" allegedly conflicting statutes involving federal spending. The Administrator states:

> [the President] has the responsibility to evaluate the competing needs of this program and other claims on the limited total federal financial resources from which all expenditures are made.

Brief for Petitioner at 12. This argument implicitly interprets "faithfully execute" as a grant of discretion and authority. In fact, the faithfully execute clause represents a duty to perform rather than a grant of discretion. The Executive must attempt to execute the laws in good faith -- not circumvent the intent of Congress.

Conflict purportedly results when Congress appropriates more funds than are allowed to be spent under limited revenues and a debt limit. However, this conflict, when and if it exists, need not be resolved by unilateral executive impoundment.

Even assuming arguendo that such a conflict was presented in this case, Congress has specified procedures for the Executive to follow in such an event. In the Budget and Accounting Act of 1921, section 202, 31 U.S.C. §13 (a) (1970), the Congress provided that if estimated revenues for the fiscal year plus estimated Treasury surplus carried over into that year are less than projected expenditures, then "the President in the Budget *shall* make recommendations to Congress for new taxes, loans, or other appropriate action to meet the estimated deficiency." (emphasis added). The legislative history of this section clearly indicates that the word "shall" was inserted to mandate the Executive to return to the Congress and not to

take unilateral action. Significantly, in the precursor of this section the language was permissive and not mandatory.[29]

Notably, the Executive has often requested Congress to increase the debt ceiling to meet excess expenditures. In fact, from March 15, 1972 to date, Congress has adjusted the ceiling five times.[30] These legislative responses indicate Congress generally favors increased spending over maintenance of the existing public debt and does not wish substantive programs to be sacrificed to maintain that ceiling. *See* Note, *Impoundment of Funds* 86 HARV. L. REV. 1505, 1522 (1973).

Further, as a temporary expedient, the Executive could draw upon the Treasury's cash reserve of $6 billion and margin for contingencies of $3 billion to avoid exceeding the debt limit. Congress has acknowledged that this $9 billion could be drawn upon to pay obligations without extending the debt limit. S. REP. NO. 1292, 92d Cong., 2d Sess. 5-6 (1972); *see* S. REP. NO. 249, 93d Cong., 1st Sess. 10 (1973). Therefore, before there is even a remote possibility of a conflict with the debt ceiling, the Executive could draw upon the $9 billion cushion for a considerable

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[29] The predecessor to 31 U.S.C. §13 (a), the "Smith Amendment," 35 Stat. 1027, March 4, 1909, read as follows:

> [To] the end that [the President] *may* . . . advise the Congress how in his judgment the estimated appropriations could with least injury to the public service be reduced so as to bring the appropriations within the estimated revenues, or, if such reduction be not in his judgment practicable without undue injury to the public service, that he may recommend to Congress such loans or new taxes as may be necessary to cover the deficiency. (emphasis added).

The essence of the "Smith Amendment" was later incorporated into the Budget and Accounting Act of 1921, 31 U.S.C. §13. The principal difference between the original language and the amended language is that "may recommend" was changed to "shall recommend."

[30] Pub. L. No. 93-173 (Dec. 1, 1973), 87 Stat. 691; Pub. L. No. 93-53 (July 1, 1973), 87 Stat. 134; Pub. L. No. 92-599 (Oct. 27, 1972), 86 Stat. 1324; Pub. L. No. 92-336 (July 1, 1972), 86 Stat. 406; Pub. L. No. 92-550 (March 15, 1972), 86 Stat. 63, 31 U.S.C.A. §757 (b), note (Supp. 1974).

period of time without first having to return to Congress with new recommendations.[31]

Significantly, the statutory procedure required by 31 U.S.C. §13 (a) and the other alternative modes of solution to the alleged debt ceiling conflict present a strikingly similar parallel to the situation facing President Truman during the "Steel Seizure Crisis." The Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), struck down the President's attempted seizure of the steel mills, holding that the seizure could not be justified under his constitutional powers. In 1947, Congress, in rejecting an amendment granting power to seize private industries in emergencies,[32] expressed its view that it would prefer to deal with such problems itself on an ad hoc basis pursuant to presidential recommendations. 343 U.S. at 599-600 (Frankfurter, J., concurring); *see* 93 CONG. REC. 3637-45 (1947).

[31] In some circumstances the Government might even be able to extend payments of contracts by a few weeks, so that outlays would occur in the next fiscal year. Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1522 (1973). In fact, this Administration has on one occasion delayed payment of general revenue sharing disbursements so as to be accounted for in the succeeding fiscal year. THE BUDGET OF THE UNITED STATES GOVERNMENT, 1974 -- APPENDIX 764 (1973); *see* Pub. L. No. 92-512, §102, 86 Stat. 919, 31 U.S.C.A. §1221 (Supp. 1974).

[32] Notably, the prior congressional rejection of the power exercised by President Truman is directly analogous to the case at bar. In recent action on the public debt, Congress increased the borrowing power of the Government while rejecting a limit on fiscal 1973 expenditures. Pub. L. No. 92-599 (Oct. 27, 1972), §201, 86 Stat. 1324, reprinted in 1972 U. S. CODE CONG. & ADM. NEWS 1542. Congress specifically voted on and rejected two amendments which would have given the Executive the discretionary power to impound appropriated funds. 118 CONG. REC. H10282-84 (daily ed. Oct. 18, 1972); *id.* at H10224-34, S18506, S18508, S18510, S18512-30 (daily ed. Oct. 17, 1972); *id.* at H9363-401 (daily ed. Oct. 10, 1972). *Compare* H. R. REP. NO. 1614, 92d Cong., 2d Sess. 3-4 (1972), reprinted in 1972 U. S. CODE CONG. & ADM. NEWS 4976-77, *with* H. R. REP. NO. 1606, 92d Cong., 2d Sess. 3-4 (1972), reprinted in 1972 U. S. CODE CONG. & ADM. NEWS 4972-73; *see* S. REP. NO. 1292, 92d Cong., 2d Sess. 1-2, 7-9 (1972), reprinted in 1972 U.S. CODE ADM. NEWS 4948-49, 4954-56.

That is precisely the policy expressed in 31 U.S.C. §13 (a): The President cannot unilaterally *do* that which he can only *recommend*. As Justice Clark stated: "[W]here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis...." 343 U. S. at 662. Thus, given the several alternatives available to the Executive to deal with the alleged conflict between the debt ceiling and appropriations, the executive branch should choose one of them rather than circumvent the intent of a congressional enactment, as it has done in the instant case by reducing allotments.[33]

Therefore, the debt ceiling conflict cannot serve as a legal justification for the unilateral termination of a congressionally authorized program. The Administrator has alleged only a potential conflict. Even if such conflict were real, statutory procedures are available to resolve the conflict, procedures which the Executive has failed to follow. Moreover, as *Youngstown* has determined, when a subject is within the purview of congressional power, and Congress has acted, the President may not act in contravention of the stated legislative policy. 343 U.S. at 586-89.

Further, the Executive has urged the responsibility to manage the economy under the 1946 Employment Act, 15 U.S.C. §§1021-25 (1970), as conflicting with expenditure statutes.[34]

[33] Whatever the merit of Administrator's reliance on the debt ceiling, it is clearly a reason collateral to and remote from the purposes of the water pollution control program. Therefore, it falls within the prohibition established by *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1114 (8th Cir. 1973), where the court held that the Secretary of Transportation could not withhold funds from state highway programs for reasons remote from and unrelated to those which Congress had established. *See* Guadamuz v. Ash, 368 F. Supp. 1233, 1241 (D.D.C. 1973).

[34] OMB Report Under Impoundment & Information Act, 39 Fed. Reg. 7707, 7708 (1974), reprinted in 120 CONG. REC. S4616, S4617 (daily ed. Mar. 28, 1974); *Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 97 (1971) (testimony of Caspar Weinberger).

The Employment Act was designed to institutionalize the budget as an economic tool. S. BAILEY, CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946, at 11-12 (1950). The Employment Act itself gives no particular power to the President. In fact, it limits him to an advisory role and places enactment power in Congress. There is no reference to inflation in the Act, and the timing of its passage immediately after World War II confirms that the main concern was promoting an economy able to provide jobs for the returning veterans, rather than fighting inflation.[35] In its original form the bill was titled *Full* Employment Act and was dedicated to that goal. S. BAILEY, *supra; see* 15 U.S.C. §1021 (1970). A logical construction of the Employment Act indicates that it contemplates final policy determinations being made by Congress. Although recommendations from the President are envisioned, the provisions for a congressional committee indicate the intent for ultimate legislative input. *See* 15 U.S.C. §§1022-24 (1970). The Act would, therefore, not justify impoundment without review or approval by Congress.[36] *See Massachusetts v. Weinberger*, Civil No. 1308-73 (D.D.C., July 26, 1973), reprinted in 119 CONG. REC. S15044, S15045 (daily ed. July 30, 1973). *See also Louisiana v. Weinberger*, 369 F. Supp. 856, 864 (E.D. La. 1973).

[35]Economic studies have raised questions as to the efficacy of impoundment as a fiscal tool. The studies indicate that current impoundments have caused some unemployment and have failed to significantly reduce inflation. Levinson & Mills, *Budget Reform and Impoundment Control*, 27 VAND. L. REV. 615, 620-21 (1974); Findings of McIntosh Foundation Executive Impoundment Project, 119 CONG. REC. S21120, S21124 (daily ed. Nov. 27, 1973).

[36]The Administration has also cited the Economic Stabilization Act Amendments of 1971, 12 U.S.C. §1094 (Supp. II 1972), as a broad grant of power to the President to impound for economic reasons. OMB Report Under Federal Impoundment & Information Act, 38 Fed. Reg. 19,582 (1973). However, amendments enacted in 1973 contain a direct prohibition of impoundments under the Act. Pub. L. No. 93-28 (Apr. 30, 1973), §4, 87 Stat. 27, 12 U.S.C.A. §1904, note (Supp. 1974).

Thus, when juxtaposed with the statutory mandate of the Water Pollution Control Act for full allotment and the policy that the waters of America be restored by 1985, neither the debt ceiling nor the 1946 Employment Act present the Executive with conflicting statutory responsibilities so as to justify unilateral reduction of allotment under the "faithfully execute" clause. Reason and precedent dictate that the direction to "faithfully execute" is not a carte blanche to arbitrarily curtail some programs and execute others. *See National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 901 (D.D.C. 1973). *See also National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (1974). In a memo regarding impoundment written while an Assistant Attorney General, Justice William Rehnquist reasoned: "[I]t seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them."[37] Further, the Court has stated:

> To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissable.

Kendall v. United States ex rel. *Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838).

The Executive's failure to faithfully execute the Water Pollution Control Act, by refusing to allot, amounts to legislation, a power clearly prohibited to the Executive. *See Local 2677, AFGE v. Phillips*, 358 F. Supp. 60, 76-77 (D.D.C. 1973). *See also Guadamuz v. Ash*, 368 F. Supp. 1233, 1241-42 (D.D.C. 1973). In the Federal Convention of 1787, the States unanimously rejected a motion "that the National Executive have a power

[37]Memo from William Rehnquist reproduced in *Joint Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 390, 394 (1973).

to suspend any Legislative act . . . ."[38] As the Court stated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."

Clearly, the faithfully execute clause does not authorize the Executive's actions in the instant case. In fact, the clause prohibits and condemns the failure to fulfill the mandate of the Water Pollution Control Act.

B. THE EXECUTIVE DOES NOT HAVE INHERENT AUTHORITY TO REFUSE TO CARRY OUT THE PURPOSES AND PROVISIONS OF CONGRESSIONAL PROGRAMS DULY ENACTED INTO LAW.

The President asserts that he has the inherent power to impound,[39] on the basis of the constitutional provision that "[t]he executive Power shall be vested in a President of the United States of America." U. S. CONST. art. II, §1. In determining the extent of power inherent in the presidency, there are generally three criteria: (1) the lack of an express constitutional commitment of power to a coordinate branch or of an express prohibition of its exercise by the President; (2) the historical and customary exercise of a power by the Executive over a

[38] H. R. DOC. NO. 398, 69th Cong., 1st Sess. 152 (1927) (Documents Illustrative of the Union of American States); *see id.* at 753.

[39] At a news conference held in January, 1973, the President stated:

> The constitutional right for the President of the United States to impound funds and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people, that right is absolutely clear.

9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 11 (1973). *See also Joint Hearings on S. 373, supra* note 37, at 270 (statement of OMB Director Roy Ash); *id.* at 369 (statement of Deputy Attorney General Joseph Sneed); *id.* at 836-37 (Dep't of Justice Answers to Questions Concerning Impounding of Appropriated Funds Posed by Sen. Ervin in his letter of Feb. 14, 1973, to the Dep. Att'y Gen.).

long period of time, coupled with tacit or express congressional approval; and (3) the existence of a situation that necessitates executive action for the public interest. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 534-35 (1871).

No provision of the Constitution clearly commits the "impoundment" power to a coordinate branch or explicitly prohibits its exercise by the President. The grant of the appropriation power to Congress does not, on its face, give Congress power over the manner in which appropriations are executed, although this extension may be reasonably implied as a necessary adjunct. However, other constitutional provisions bear directly on the issue and provide a textually demonstrable commitment of the power to make policy as distinguished from merely spending. Article I of the Constitution vests the legislative power in the Congress. This implies that Congress alone shall determine national policy except: (1) when a veto is sustained, (2) when a statute is declared unconstitutional, or (3) when the Constitution commits certain policymaking power to another branch.[40] One of the principal methods by which Congress can determine national policy is by enacting authorization or appropriation bills. Thus, if the Executive impounds funds or terminates programs and thereby frustrates the congressional policy underlying the authorization or appropriation, he usurps the policymaking power, which article I vests in Congress. Therefore, as to impoundments that affect legislative policy, a textually demonstrable commitment is present

[40] Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 193 (1974).

which precludes exercise of inherent presidential authority.[41]

Where the text is unclear, the standard is whether the practice is one of long standing and whether action or inaction of Congress has added a gloss to presidential powers. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Court ruled that the President was the nation's representative in foreign affairs and cited prior congressional acts which took cognizance of that fact. In *United States v. Midwest Oil Co.*, 236 U. S. 459 (1915), the Court found that even congressional silence could acknowledge the existence of an executive power. The Court emphasized, however, that the holding did not "mean that the Executive [could] by his course of action create a power." *Id.* at 474. Thus, even though an act may continually occur, it may still be unconstitutional.

The President is currently relying heavily on long standing congressional inaction in the face of ongoing impoundment.[42] However, the historical argument as applied to the instant case and other contemporary impoundments is without support since President Nixon's impoundments are significantly different from those of past administrations.[43] Before Franklin

[41]*See* Louisiana V. Weinberger, 369 F. Supp. 856, 864-65 (E. D. La. 1973); Guadamuz v. Ash, 368 F. Supp. 1233, 1241, 1243-44 (D. D.C. 1973); Community Action Programs Executive Directors Ass'n of New Jersey, Inc. v. Ash, 365 F. Supp. 1355, 1360-61 (D. N.J. 1973); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 901 (D. D.C. 1973); Oklahoma v. Weinberger, 360 F. Supp. 724, 728 (W. D. Okla. 1973); Local 2677, AFGE v. Phillips, 358 F. Supp. 60, 76-78 (D. D.C. 1973); American Ass'n of Colleges of Podiatric Medicine v. Ash, Civil No. 1139-73, Slip Op. at 3 (D. D.C., Oct. 26, 1973); Massachusetts v. Weinberger, Civil No. 1308-73 (D. D.C., July 26, 1973) reprinted in 119 CONG. REC. S15044, S15045 (daily ed. July 30, 1973); National League for Nursing v. Ash, Civil No. 1316-73, Slip Op. at 4 (D. D.C., July 10, 1973).

[42]*See Joint Hearings on S.373, supra* note 37, at 359 (remarks of Dep. Att'y Gen. Sneed).

[43]Levinson & Mills, *Impoundment: A Search for Legal Principles, supra* note 40, at 198-99 (1974); *see* Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFFALO L. REV. 141, 143-70 (1973); Miller, *Impoundment: The New Constitutional Crisis*, THE PROGRESSIVE, March 1973, at 15.

D. Roosevelt there were but isolated instances of impoundment.[44] President Roosevelt impounded only public works and military appropriations.[45] The administrations of Presidents Truman, Eisenhower, and Kennedy reveal no pattern of impounding domestic non-military appropriations.[46] Further, two Presidents specifically stated they felt they did not have the power to affect statutory policy by controlling spending.[47] Not until the Johnson Administration have amounts been impounded from domestic programs for fiscal reasons. However, the Johnson precedent, less than ten years old, provides no support for similar action by his successors. The Nixon impoundments, while similar in the aggregate amounts involved, are qualitatively different. The Johnson impoundments had relatively minor impact upon most programs.[48] In contrast, President Nixon has deliberately and frankly imposed his own

[44]*See* Stanton, *The Presidency and the Purse: Impoundment 1803-1973*, 45 U. COLO. L. REV. 25, 26-28 (1973).

[45]Williams, *The Impounding of Funds by the Bureau of the Budget*, reprinted in *Joint Hearings on S.373, supra* note 37, at 844.

[46]*See* Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROB. 135, 162 (1972).

[47]With regard to his own exercise of spending discretion, President Franklin D. Roosevelt, a proponent of a strong presidency, stated: "[o]ur statutory system of fund apportionment is not a substitute for item or blanket veto power and should not be used to set aside or nullify the expressed will of Congress...." Letter from President Roosevelt reproduced in part in *Hearings on H. R. 3598 Before a Subcomm. of the Senate Comm. on Appropriations*, 78th Cong., 1st Sess. 739 (1944). President Kennedy also rejected a broad power to impound with regard to federal funds to be given to segregated schools. Although he believed such funding violated the equal protection and due process clauses as interpreted by the Court, he stated: "I don't have the power to cut off the aid in a general way . . .and I think it would probably be unwise to give the President of the United States that kind of power." N. Y. Times, April 20, 1973, at 11, col. 5.

[48]Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1512 (1973); Findings of McIntosh Foundation Executive Impoundment Project, 119 CONG. REC. S21120, S21125 (daily ed. Nov. 27, 1973).

priorities,[49] and has thereby frustrated the intent of Congress with regard to numerous domestic programs.[50] This policy-oriented series of impoundments is unsupported by tradition[51] and, therefore, can not justify reliance upon inherent authority as a predicate for terminating congressionally authorized programs.

The public interest factor, the third criterion for recognition of inherent executive power, applies only to short-term reactions to emergency situations, In re *Neagle*, 135 U.S. 1 (1890), where legislative ratification is expected. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). In the instant case no such emergency has even been alleged by the Administrator. Further, even a purported "national emergency" is not always sufficient to sustain a claim of inherent power. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952), the Court ruled that the President was not empowered to seize the steel mills in order to maintain production for the war effort.

Moreover, even if a "national emergency" of a magnitude to justify 55% allotment reduction was in existence, there is no expectation of legislative ratification. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). To the contrary, congressional response to this kind of behavior by the Executive has been severe.[52]

[49] It is difficult to deny that President Nixon himself felt that allotment of authorized funds was mandated by the Act, precisely because he vetoed it on the grounds that it was too expensive. There was no point in the veto if the unfettered discretion the President now asserts had existed. In effect, the President has reinstated the veto which Congress overrode by merely reading the statute as he chose.

[50] Fisher, *Impoundment of Funds: Uses and Abuses*, *supra* note 43, at 169-88; Levinson & Mills, *Budget Reform and Impoundment Control*, 27 VAND L. REV. 615, 618, 620 (1974); Levinson & Mills, *Impoundment: A Search for Legal Principles*, *supra* note 40, at 199.

[51] *Id; Joint Hearings on S. 373*, *supra* note 37, *passim; Hearings on Executive Impoundment*, *supra* note 34, *passim*.

[52] The new Congressional Budget and Impoundment Control Act of 1974 has restricted authority to accomplish withholding such as that accomplished in the instant case. *See* note 71 *infra*.

Another limitation to inherent power, which is particularly related to President Nixon's impoundments, was stressed in *Curtiss-Wright*, 299 U.S. 304 (1936), where the Court recognized a distinction between inherent power in the realms of foreign policy and domestic affairs. The Court stated that inherent powers were much more restricted in the domestic arena, *id.* at 320, in which most of President Nixon's impoundments have occurred, including the instant case. *See* OMB Report Under Federal Impoundment & Information Act, 38 Fed. Reg. 19,581 (1973). Thus, the impounding of domestic programs can derive little authority from the President's foreign affairs powers. *See Guadamuz v. Ash*, 368 F. Supp. 1233, 1243-44 (D.D.C 1973); *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 901 (D.D.C. 1973). To conclude otherwise would justify domestic executive action on a foreign policy basis for almost any act imaginable. The distinction between the President's domestic and foreign affairs powers is meaningful only upon the assumption that some activities are regarded, for these purposes, as being too remote from foreign affairs. Impoundment of domestic program funds has only an indirect connection with foreign affairs, and does not invoke the foreign affairs power in the way indicated by *Curtiss-Wright*.

No constitutional authority in the Executive, inherent or otherwise, grants the power to usurp prerogatives of another branch or ignore duly enacted laws. The Constitution recognizes specifically the Executive's role regarding the enactment of laws. The concept of inherent authority cannot be used as a means of appending an unconstitutional veto power to the legitimate executive duty to implement legislative policy. The President must not be allowed to accomplish through impoundment that which he could not accomplish through veto of the Water Pollution Control Act.

C. THE EXECUTIVE'S REFUSAL TO IMPLEMENT THE WATER POLLUTION CONTROL ACT, EVEN AFTER PASSAGE OVER AN EXECUTIVE VETO, REPRESENTS AN UNCONSTITUTIONAL EXPANSION OF THE VETO POWER.

The President's role in legislation is made clear in the veto provision of the Constitution. Art. I, §7. When Congress passes a bill, the President has the power to veto it, after which it returns to Congress and may be overridden. Discussions of the veto power in the Constitutional Convention show that a veto without override was considered (termed "absolute negative") but was rejected unanimously as placing too much authority in the hands of a single man.[53] In the case at bar, the unilateral refusal to implement a duly enacted statute deprived Congress of its constitutional opportunity to override President Nixon's "veto" accomplished by means of impoundment. If the President frustrates the will of Congress by impounding, with no opportunity for congressional override, he achieves the equivalent of an absolute veto. In the instant case, the use of the constitutional veto had already been overriden and the impoundment operated as a second and absolute veto.

Moreover, the Executive in the instant case has exercised an unconstitutional item veto by failing to allot 55% of authorized funds, while allotting the balance. The Constitution makes no provision for an item veto and the numerous proposals to introduce this feature into the Constitution have been rejected.[54]

[53] 5 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 151-54, 536-38 (ed. 1941).

[54] E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 280 (4th ed. 1951); R. WALLACE, CONGRESSIONAL CONTROL OF FEDERAL SPENDING 141-42 (1960); *see* Note, *The Item Veto in the American Constitutional System*, 25 GEO. L. J. 106 (1936); *Joint Hearings on S.373*, *supra* note 37, at 110-14 (Attachment to Statement of Comp. Gen. Elmer Staats).

Congress overrode the presidential veto of the Act by a substantial margin and it should have hereceforth been implemented consistent with the expressed will of the Act. Refusal to carry out the Act amounted to a circumvention and an addition to the constitutional process of veto.

III. THE SOVEREIGN IMMUNITY DOCTRINE IS NO BAR WHEN THE ADMINISTRATOR FAILS TO PERFORM A STATUTORY DUTY OR EXCEEDS HIS DISCRETION.

The assertion of sovereign immunity has been almost uniformly rejected in impoundment cases[55] and does not present a bar to justiciability in the instant case. Rejection of sovereign immunity is supported by the reasoning that the doctrine is not intended to protect actions outside the law. The doctrine of sovereign immunity has been continually eroded both through specific waivers[56] and a general narrowing of the doctrine[57] although it is still routinely raised by the Government.[58]

[55] New York v. Train, 494 F.2d 1033, 1038-39 (D.C. Cir. 1974); Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 495 (4th Cir. 1973); State Highway Comm'n v. Volpe, 479 F.2d 1099, 1123 (8th Cir. 1973); Louisiana v. Weinberger, 369 F. Supp. 856, 861-62 (E.D. La. 1973); Guadamuz v. Ash, 368 F. Supp. 1233, 1236 (D.D.C. 1973); Brown v. Ruckelshaus, 364 F. Supp. 258, 261 (C.D. Cal. 1973); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 900 (D.D.C. 1973); Local 2677, AFGE v. Phillips, 358 F. Supp. 60, 68-69 (D.D.C. 1973). *But see* Housing Authority of San Francisco v. HUD, 340 F. Supp. 654, 656 (N.D. Cal. 1972); San Francisco Redevelopment Agency v. Nixon, 329 F. Supp. 672 (N.D. Cal. 1971).

[56] Two major examples of general waivers of immunity are the Tucker Act, 28 U.S.C. §1491 (1970), and the Tort Claims Act of 1946, 28 U.S.C. §1346 (b) (1970); specific statutes also allow suit against individual agencies, *see, e.g.*, Housing Act of 1937, 42 U.S.C. §§1401-35 (1970).

[57] *E.g.*, Land v. Dollar, 330 U.S. 731 (1947).

[58] *See Hearings on "Sovereign Immunity" Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess 28-30, 64-75 (1970).

A. THE ADMINISTRATOR'S ACTIONS ARE IN VIOLATION OF HIS LEGAL DUTIES UNDER THE ACT AND CONSEQUENTLY SUIT MAY BE BROUGHT THROUGH AN "OFFICER SUIT," A WELL ESTABLISHED EXCEPTION TO SOVEREIGN IMMUNITY.

Judicial review has been made available when the officer or federal agency has acted in excess of its statutory authority, acted in an unconstitutional manner, or acted pursuant to an unconstitutional grant of authority. *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-91 (1949). In addition, *Rockbridge v. Lincoln*, 449 F.2d 567, 572-73 (9th Cir. 1971), established that the exception applies when an official fails to perform a statutory duty. An action, within the exception to the doctrine, against an official or agency is commonly known as an "officer suit." The philosophy behind the exception to the sovereign immunity doctrine is expressed in *The Floyd Acceptances*, 74 U. S. 666, 676-77 (1868):

> We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority.

It is explicitly alleged in the instant case that the Administrator not only acted beyond his statutory authority in failing to comply with the mandatory allotment, but he also acted in an unconstitutional manner. All courts which have ruled on the Water Pollution Control Act impoundments have found that sovereign immunity presents no bar to judicial review when

there is an allegation and subsequent finding of violation of statutory or constitutional duty.[59]

Of the over sixty impoundment cases decided to date[60] in

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[59]Judge Merhige, in *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689, 694-95 (E.D. Va.) remanded with directions *sub nom. Campaign Clean Water, Inc. v. Train*, 489 F.2d 492 (4th Cir. 1973), held:

> the instant matter squarely falls . . .within a well-settled exception to the sovereign immunity doctrine . . . .suit may be brought against an officer of the United States to challenge an action which *allegedly* exceeds statutory authority or, if within the scope of authority, is premised upon a power which is unconstitutional. . . .The complaint alleges that the defendant has exceeded his statutory authority in impounding funds. If sustained on the merits, plaintiff will come within the above recited exception to the doctrine. (emphasis added).

In *New York v. Ruckelshaus*, 358 F. Supp. 669, 673 (D.D.C. 1973), *aff'd sub nom New York v. Train*, 494 F.2d 1033 (D.C. Cir. 1974), Judge Gasch held:

> plaintiff's action falls squarely within the exception covering suits challenging actions by federal officers which go beyond the scope of their statutory powers.

The court in *Brown v. Ruckelshaus* noted:

> Both complaints *allege* that the EPA has exceeded its statutory authority in impounding the authorized funds. If sustained on the merits, Congressman Brown and Los Angeles would fall within the exception. . . .

364 F. Supp. 258, 261 (C.D. Cal. 1973) (emphasis added). *See* New York v. Train, 494 F.2d 1033, 1038 (D.C. Cir. 1974); Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 495 (4th Cir. 1973). Further, other courts considering impoundment cases have consistently ruled that allegations of breach of statutory duty defeat any claim of sovereign immunity. In *Louisiana v. Weinberger*, 369 F. Supp. 856, 861-62 (E.D. La. 1973), the court maintained:

> It has now been held in several cases that the sovereign immunity doctrine does not bar impoundment suits which are based on the *allegation* that defendants' actions are beyond the scope of their statutory authority and are, therefore, unconstitutional. (emphasis added).

[60]The most comprehensive collection of impoundment cases decided by federal courts is L. FISHER, COURT CASES ON IMPOUNDMENT OF FUNDS: A PUBLIC POLICY ANALYSIS (Congressional Research Service, Library of Congress, multilith, March 15, 1974).

which sovereign immunity has been raised, only one has accepted the defense of sovereign immunity.[61] *Housing Authority of San Francisco v. HUD*, 340 F. Supp. 654, 656 (N. D. Cal. 1972). In this case, the district court interpreted the statute involved to be discretionary. Sovereign immunity applied since the Administrator, in the court's understanding, acted within the discretionary language. Given this conclusion, the holding is consistent with the doctrine of *Larson*.

An additional restriction to waiver of sovereign immunity exists where a judgement "would expend itself on the public treasury or domain or interfere with the public administration." *Land v. Dollar*, 330 U. S. 731, 738 (1947). This was further detailed by the Court in *Larson* to allow sovereign immunity to prevent a suit where judgement "will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Larson v. Domestic & Foreign Finance Corp.*, 337 U.S. 682, at 691 n.11 (1949). The Ninth Circuit interpreted *Larson* as applying where "relief sought would work an intolerable burden on governmental functions, outweighing any consideration of private harm." *Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969).

The instant case involves no expenditure on the treasury or interference with public administration. If anything, the action in the case at bar promotes compliance with public administration according to the law. Further, there is no expenditure from the treasury for two reasons. First, ordering the

[61] In another case, *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N. D. Cal.1971), the district court avoided consideration of the exception to sovereign immunity by simply holding that mandamus would not lie to force President Nixon to allot funds. The court believed it could not direct a mandate toward the person of the President. This view, however, has been overruled. *E.g.*, National Treasury Employees Union v. Nixon, 492 F.2d 587, 616 (D.C. Cir. 1974).

Administrator to allot results only in funds being made available for obligation and does not result in expenditure.[62] Second, the funds are already authorized to be expended by law; there is no unconsented drain on the treasury -- "the sovereign" has already consented to expenditure by making a law allowing expenditure.[63] The Ninth Circuit in *Rockbridge* similarly reasoned:

[62] In *New York v. Ruckelshaus*, 358 F. Supp. 669, 673 (D.D.C. 1973), Judge Gasch held:

> Defendant is not aided by the general rule set forth in *Land v. Dollar* . . . for . . .the relief sought by plaintiff in this action does not require the *expenditure* of unappropriated public funds (or indeed of any public funds at all), nor will it interfere with the lawful exercise of defendant's discretionary powers under the Act . . . .Plaintiff is demanding only that funds be *allotted* as, in its view, Congress required.

Similarly, it was held in *Brown v. Ruckelshaus*, 364 F. Supp. 258, 261 (C.D. Cal. 1973):

> Here the suit is . . .requesting relief that does not require the *expenditure* of any unappropriated funds. They only ask for the allotment of the funds, and the EPA retains the discretion not to incur any obligation to expend them. There is no interference with the lawful exercise of Defendant's discretionary powers under the Act.

The district court in *Texas v. Fri* held:

> the relief would not cause the *expenditure* of any unappropriated funds but only the *allotment* to the States of such funds . . . .While these funds would become available for obligation, they would not thereby become obligated until Defendant approves a specific grant.

No. A-73, CA-38, Slip Op. at 3 (W.D. Tex., Oct. 2, 1973), *appeal argued*, No. 73-3965, 5th Cir., Apr. 29, 1974.

[63] Lower courts have consistently held that sovereign immunity is not a bar if the funds to be expended have already been authorized or appropriated by Congress. In *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973), the court held:

> [A]ny affirmative order of this Court would be premised on a determination that official action by the defendants in refusing to spend is beyond their statutory or constitutional powers. This would go no further than to require the spending of funds already appropriated by Congress to achieve the declared purposes of the Act. Accordingly, there can be no effective assertion of sovereign immunity and the defendants' actions are reviewable by the courts.

(cont'd)

> Appellants are not seeking money damages from the government, nor are they seeking to assert some right against it or to block a government project. The relief they seek does not in any way affect the sovereign power of the United States. The government is not asked to give up a right, to grant a concession, to dispose of property or to relinquish authority. Appellants merely seek a court order directing certain government officials to perform acts which Congress has already directed those officials to perform . . . .

449 F.2d 567, 573 (9th Cir. 1971).

Judgement in the case at bar is not an "intolerable burden" but merely an enforcement of a duty. The action does not seek the actual expenditure of funds, but is only seeking performance of a ministerial act. The Executive may not rely on the doctrine of sovereign immunity to frustrate the will of the sovereign. The Constitution vests control over the government's property and grants the power to appropriate and legislate to Congress. When Congress enacts a law to expend, as with the Water Pollution Control Act, enacted over presidential veto,

[63] (cont'd)

The district court in *Local 2677, AFGE v. Phillips*, 358 F. Supp. 60, 68-69 (D.D.C. 1973), held:

> the relief which the Plaintiffs seek would not be a drain on the public purse. No injunction to spend unappropriated funds is sought . . . [A]ny order of this Court requiring the defendant to act in accordance with the mandate of Congress would draw upon funds appropriated for that purpose.

In *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973), the Eighth Circuit Court of Appeals maintained:

> we do not consider the court's decree . . as being affirmative in nature. It requires only that the defendent officers cease unauthorized action . . . . The resultant release of funds is only to the extent that Congress has already authorized them to be appropriated and expended.

the sovereign has expressed its will.[64] The Administrator alleges "plaintiff is seeking to compel a government official to furnish him with greater government funds than the official believes is appropriate . . . ." Brief for Petitioner at 37-38. The observation is exactly true and demonstrates precisely why states and municipalities must seek to compel the "official" to perform his duty according to statutory intent as interpreted by the Court rather than according to what the official "believes is appropriate."

B. THE ADMINISTRATIVE PROCEDURE ACT OPERATES AS A WAIVER OF SOVEREIGN IMMUNITY AND PERMITS REVIEW OF THE ADMINISTRATOR'S REFUSAL TO ALLOT.

While sovereign immunity can be avoided by the "officer suit," it is also waived by the APA, which would likewise allow review in the instant case. The provision which supports waiver is section 10. 5 U.S.C. §702. Whether section 10 constitutes a basis for waiver of sovereign immunity has been a much debated issue. The Administrator summarily alleges the APA is not a waiver of sovereign immunity, citing *Blackmar v. Guerre*, 342 U.S. 512, 515-16 (1952), in which the statement was made: "Still less is the Act to be deemed an implied waiver of all governmental immunity from suit."

Of course the argument in the instant case is not that there is a general waiver of all immunity but that the APA, in instances where an administrator exceeds his authority, grants the right to review to " [a] person . . .adversely affected or aggrieved by agency action . . . ." 5 U.S.C. §702 (1970).

[64] In effect, the enactment of legislation to dispose of property is a waiver of sovereign immunity. *See* Comment, *Presidential Impounding of Funds: The Judicial Response*, 40 U. CHI. L. REV., 328, 349 (1973). Waiver is undisturbed by later administrative actions contrary to congressional policy. Clakamas County v. McKay, 219 F.2d 479, 493 (D.C. Cir. 1954), *vacated as moot*, 349 U. S. 909 (1955).

Sovereign immunity has been increasingly abrogated by findings that the APA is an implied waiver.[65] Three circuits now adopt this position.[66] Although a majority of circuits have not accepted the proposition that the APA is an implied waiver, the better conclusion is that an act which shows as one of its goals reviewability of agency action would contemplate a waiver of sovereign immunity to allow that review.[67] As the D.C. Circuit has reasoned: "It seems axiomatic to us that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; any other construction would make the review provisions illusory." *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970).

C. SOVEREIGN IMMUNITY IS SPECIFICALLY WAIVED BY SECTION 505 OF THE WATER POLLUTION CONTROL ACT.

One method of removing sovereign immunity is by specific waiver. The Act contains such provisions under which a citizen is given jurisdiction to sue an administrator for alleged failure to perform an act which is not discretionary under the statute. Respondents in the instant case fall within the purview of the statutory waiver:

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[65] *See* Student Project, *Federal Administrative Law Developments-1971*, 1972 DUKE L. REV. 115, 244.

[66] Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 873 (D.C. Cir. 1970); Kletschka v. Driver, 411 F.2d 436, 445 (2d Cir. 1969); Estrada v. Ahrens, 296 F. 2d 690 (5th Cir. 1961); *See* Warner v. Cox, 487 F.2d 1301, 1304-05 (5th Cir. 1974) (APA constitutes general waiver except in actions ex contractu for money damages).

[67] *Accord*, Constructores Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183, 1191 (D.C. Cir. 1972); Local 2677, AFGE v. Phillips, 358 F. Supp 60, 69 (D.D.C. 1973).

CITIZEN SUITS

Sec. 505 (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf --

. . . .

(2) against the Administrator where there is *alleged* a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309 (d) of this Act. [emphasis added]

. . . .

(g) For the purposes of this section the term 'citizen' means a person or persons having an interest which is or may be adversely affected.

GENERAL DEFINITIONS

Sec. 502. Except as otherwise specifically provided, when used in this Act:

. . . .

(5) The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

The foregoing provisions eliminate the need for the Court to consider jurisdiction over the subject matter and parties to this suit. These provisions require only an allegation that the Administrator has failed to perform a non-discretionary act to acquire jurisdiction. That is the allegation in the instant case with regard to allotment.

It is noteworthy that for the first time, before this Court, the Administrator alleges as a defense Respondents' failure to comply with the sixty-day statutory time limit in section 505(b). It is not appropriate for the Administrator to plead prior ignorance of this provision, for it would then be difficult to argue that Respondents should be held to know what the Administrator did not. Even so, the Administrator could not convincingly plead ignorance, for in *Brown v. Ruckelshaus*, the court noted the temporal defect challenged here, stating that it *might* be grounds for dismissal. 364 F. Supp. 258, 265 n.10 (C.D. Cal. 1973). Notably, the court in *Brown* relegated this point to a footnote and proceeded to hear the case on its merits. Since *Brown* was decided a month before the Fourth Circuit heard Respondent's case, the Administrator should have known about the defense. Thus, by failing to object and pleading the instant case on the merits, the Administrator waived any procedural irregularity arising out of the failure to give notice in exactly the manner prescribed by the statute. *Cf. Arp v. United States*, 244 F.2d 571, 574 (10th Cir.), *cert. denied*, *355* U.S. 826 (1957).

The Administrator has argued that Respondents have access to the district court only under the provisions of section 505(a)(2), even though Respondent did not invoke it. Brief for Petitioner at 40-41. However, section 505(e) specifically states that:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief *including relief against the Administrator* or a state agency). (emphasis added).

This language is expressly contrary to the Administrator's contention that section 505 is the exclusive method for waiver of sovereign immunity. Having alleged that the Administrator has failed to perform a ministerial duty owed to it by the

Administrator, Respondent stands on its invocation of jurisdiction under 28 U.S.C. §1331 and §1361 -- which, according to section 505 (e), it has the privilege of doing.

It is pertinent that section 304 (a) (2) of the Clean Air Act of 1970, 42 U.S.C. §1857 h-2 (b) (2), is substantially the same as section 505 (b) (2) of the Water Pollution Control Act in requiring sixty days notice to the Administrator prior to filing suit. *See* S. REP. NO. 414, 92d Cong., 1st Sess. 79 (1971). Failure to comply with the sixty-day limit in the Clean Air Act was the subject of *Riverside v. Ruckelshaus*, 4 ERC 1728 (C. D. Cal. 1972), in which the plaintiffs admittedly failed to give the Administrator sixty days notice before filing the action. However, the court found "substantial compliance by plaintiffs within the sixty-day notice provision" because:

1) The plaintiffs filed their complaint on September 6, 1972. Personal service of the complaint on the Administrator constituted actual notice of the plaintiffs' demand for action by the Administrator.
2) Sixty days elapsed between the filing date and the date that hearing on plaintiffs' request for injunction was complete and the court rendered its judgment.
3) During that sixty-day period, the Administrator had all the beneficial effect of the sixty-day notice provision, so that the purposes of the provision were fulfilled.
4) During the sixty-day period in which the action was pending, the Administrator not only failed to comply with plaintiffs' request, he reiterated publicly his intention not to do so.

Id. at 1730-31. All of these elements are also present in the instant case.

Even more to the point is the conclusion of the court in *Riverside* that the complaint itself can consitute notice so long as "diligent prosecution" of the complaint does not commence until sixty days has elapsed. *See* 4 ERC at 1731. *Cf. United States v. Spreckels*, 50 F. Supp. 789, 790 (N.D. Cal. 1943).

Another case, *Montgomery Environmental Coalition v. Fri*, 366 F. Supp. 261 (D. D.C. 1973), which considered the effect of the sixty-day limitation under section 505 (a) (2), reached a result comparable to that in *Riverside* under different facts. The *Montgomery* court was considering an "amended complaint" which was, in effect, a supplemental pleading subject to the sixty-day limit. *Id.* at 265. The court felt that since the violations alleged in the supplemental pleading did not create surprise or prejudice the rights of the defendants, nor frustrate the congressional purpose of the provision -- which was "to give the 'State and Federal governments' sufficient time to 'develop fully, and execute the authority contained' in section 1342," there was justification for waiving the provisions for sixty-day notice. *Id.* at 266.

It is clear that the purpose of section 505 (a) (2) is to enlarge citizens' access to the courts to enforce the provisions of the Act. Its function is not, as one court has stated regarding the Clean Air Act, a mechanism whereby failure to precisely comply causes plaintiffs to forfeit their statutory right to be in district court. *Highland Park v. Train*, 374 F. Supp. 758, 768 (N.D. Ill. 1974). Where a statute provides judicial review of an administrative action, it should not be prohibited absent clear and convincing evidence that such denial was the legislative intent. *Cf. City-wide Coalition v. Philadelphia Housing Auth.* 356 F. Supp. 123 (E.D. Penn. 1973).

In *Riverside*, the plaintiffs had the benefit of the regulations promulgated by the Administrator in December 1971 regarding the Clean Air Act. *See* 40 C.F.R. §54.3 (a) (1972). These regulations specified the elements required for giving notice of alleged failure of the Administrator to perform a ministerial act. The requirements are: (1) identification of the provision of the Act allegedly requiring an act by the Administrator; (2) description with reasonable specificity of the Act claimed not done by the Administrator; and (3) name and address of the person giving notice. As the court found, all of these elements

were included in the *Riverside* complaint which constituted compliance with the notice requirements under the regulation. Significantly, all of these elements were also present in Respondents' complaints in the instant case.

In the instant case, however, the Respondents had no benefit of guidelines regarding notice requirements under the 1972 Water Pollution Control Act Amendments. These regulations, 40 C.F.R. §135.3 (b) (1973), were not promulgated until June 1, 1973, some six months after filing of Respondents' complaints. *See Montgomery Environmental Coalition v. Fri*, 366 F. Supp. 261, 266 (1973). Thus, Respondents had no regulation regarding notice with which to comply, and as the court in *Riverside* concluded, it is not unreasonable to consider the filing of a complaint as notice. This statement seems especially apt when the requirements for notice are not yet in existence. Moreover, the complaint complied with all the requirements for adquate notice as subsequently defined by the Administrator. 40 C.F.R. §135.3 (b) (1973). Notably, these regulations were virtually identical to those promulgated pursuant to the notice provisions of the Clean Air Act. *Compare* 40 C.F.R. §135.3 (b) *with id.* §54.3 (a).

Petitioner errs in its conception of the application of the sixty-day time limitation. The Administrator reasons that since only forty-eight days elapsed from the Administrator's announcement of abbreviated allotments until filing of Respondent Campaign Clean Water's complaint on January 15, the statute could not have been complied with. Brief for Petitioner at 41. First, this conception ignores the possibility of giving notice under the provision of the Act *before* the public announcement. Even more important, however, if the complaint itself was notice, as stated in *Riverside v. Ruckelshaus*, 4 ERC at 1731, it ignores that the suit was not truly "commenced" until well beyond the sixty days, in the sense that it was not argued until more than sixty days after filing the complaint. Further, the sixty-day notice deadline should not be

applied rigidly when the Administrator can be presumed to have constructive notice of the omission of which Respondent has complained.

Section 207 itself requires that allotment occur not later than thirty days after October 18, 1972. Thus, November 17 was the statutory deadline. If the Administrator is held to notice of what the statute says, the failure to allot fully by November 17 was a violation and the Administrator had notice of his violation under the Act. Thus, filing by Respondent on January 15, 1973, was just hours short of the required sixty-day delay. The notice provision is meant to give the Administrator fair warning of his omission. In the instant case, the Administrator had not only fair warning of the objection to his action in reducing allotment, he was acutely aware of it. There is no persuasive reason for the sixty-day requirement when the Administrator makes clear his intention to behave in a given way according to his own interpretation of the Act. The question then becomes one of law rather than of fact, and no amount of fact-finding by the Administrator will cure the controversy -- only immediate recourse to the courts. As well, the Administrator has not alleged that he received no notice from Respondents. In the absence of promulgated regulations, it would seem only equitable that any communication from Respondent would comply, expecially if it contained at least those elements specified by the Administrator pursuant to the Clean Air Act. Since the Administrator failed to timely promulgate regulations defining notice as explicitly required by section 505 (b) (2), he can hardly be heard to complain if a court's view of "notice" is not his own.

IV. DETERMINING THE ADMINSTRATOR'S AUTHORITY TO ALLOT LESS THAN AUTHORIZED AMOUNTS IS JUSTICIABLE AND NOT BARRED FROM REVIEW BY THE POLITICAL QUESTION DOCTRINE OR THE ADMINISTRATIVE PROCEDURE ACT.

A. REVIEW OF THE ADMINISTRATOR'S FAILURE TO COMPLY WITH THE ALLOTMENT PROVISION OF THE WATER POLLUTION CONTROL ACT IS JUSTICIABLE AND NOT A "POLITICAL QUESTION."

The Administrator has urged that the issue before the Court in the instant case is a non-justiciable political question. Brief for Petitioner at 45, 47-48. Considering the same argument, the court in *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973), stated: "When Congress directs that money be spent and the President, as Chief Executive, declines to permit the spending, the resulting conflict is not political." The court continued: "To say that the Constitution forecloses judicial scrutiny in these circumstances is to urge that the Executive alone can decide what is best and what the law requires." *Id.* at 900-01. The role of the courts in the American system precludes an interpretation which would result in unilateral interpretation of laws by the Executive.[68]

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the court enumerated six conditions that would preclude the hearing of a case under the political question doctrine: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable or manageable standards for resolving the issue, (3) the impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion, (4) the impossibility of a court's undertaking independent resolution without

[68] "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

expressing lack of the respect due coordinate branches of government, (5) an unusual need for unquestioning adherence to a political decision already made, and (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The Administrator in the instant case has specifically argued that the issue before the Court is committed to the "political departments" and that there are no judicially manageable standards for resolving it. Brief for Petitioner at 45, 47.

As to commitment to a coordinate branch, it is clear that the issue before the Court can be determined only by the judicial branch and is not committed to the other "political departments." The issue before the Court is whether the Environmental Protection Agency has exceeded its authority in refusing to allot. The issue is one of statutory interpretation of the Administrator's discretion under the Act. It is axiomatic that "[a]n agency may not finally decide the limits of its statutory power. That is a judicial function." *See Highway Comm'n v. Volpe*, 479 F.2d 1099, 1124 (8th Cir. 1973).

Additionally, judicially manageable standards for resolving the issue *sub judice* are readily available. The issue is not "an unstructured managerial issue." Brief for Petitioner at 48. The mandate for full allotment is expressed in the statute. The interpretation of the statutory duty of an agency is clearly judicially manageable and is a basic function of the judiciary.[69]

[69]Baker v. Carr, 369 U. S. at 211; National Treasury Employees Union v. Nixon, 492 F.2d at 605; State Highway Comm'n v. Volpe, 479 F.2d 1099, 1106-07 (8th Cir. 1973); Louisiana v. Weinberger, 369 F. Supp. 854, 862 (E.D. La. 1973); Guadamuz v. Ash, 368 F. Supp. 1233, 1238 (D.D.C. 1973); Brown v. Ruckelshaus, 364 F. Supp. 258, 261-62 (C.D. Cal 1973); Seafarers Int'l. Union of N. America v. Weinberger, 363 F. Supp. 1053, 1059 (D.D.C. 1973); National Council of Community Mental Health Centers v. Weinberger, 361 F. Supp. 897, 900-01 (D.D.C. 1973); Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689, 696 (E.D. Va.), remanded with directions *sub nom.* Campaign Clean Water, Inc. v. Train, 489 F.2d 492 (4th Cir. 1973); New York v. Ruckelshaus, 358 F. Supp. 669, 675-76 (D.D.C. 1973), *aff'd sub nom.* New York v. Train, 494 F. 2d 1033 (1974); Local 2677, AFGE v. Phillips, 358 F. Supp. 60, 67-68 (D.D.C. 1973); Massachusetts v. Weinberger, Civil No. 1308-73 (D.D.C. July 26, 1973), reprinted in 119 CONG. REC. S15044, S15045 (daily ed. July 30, 1973).

The instant case moreover does not require the judiciary to supervise agency action.[70] Only in a totally discretionary statute imposing no duty upon an administrator would a lack of manageable standards exist.

While the political question doctrine may continue to be raised as a bar to impoundment litigation,[71] there is no basis for non-justiciability. The issue presented in the instant case does not fit into the formulations set forth in *Baker v. Carr*, 369 U.S. at 217, relied upon by the Administrator. The Court must merely apply judicial standards of statutory construction to determine whether the Administrator has the discretion to refuse to fully allot authorized sums. The resolution of that issue clearly does not involve a nonjusticiable political question.

[70]*See* National Treasury Employees Union v. Nixon, 492 F.2d at 605; Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 498-99 (4th Cir. 1973), *cert. granted* 94 S. Ct. 1991 (1974); Seafarers Int'l Union of N. America v. Weinberger, 363 F. Supp. 1053, 1059 (D.D.C. 1973); Pealo v. Farmers Home Administration, 361 F. Supp. 1320, 1324 (1973); Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L. J. 1636, 1651 (1972).

[71]On July 12, 1974, the President signed the Congressional Budget and Impoundment Control Act of 1974, providing *inter alia* for impoundment resolution by the political departments. Pub. L. No. 93-344, 120 CONG. REC. D839 (daily ed. July 15, 1974). The Act may have an effect on future impoundment litigation and perhaps the future disposition of the case *sub judice*, since the Administrator has alluded to the possible use of obligational controls in the event of an adverse holding. Brief for Petitioner at 14. It should be recognized that the Act's procedures for impoundment control could raise the political question issue in the context of a designation to a coordinate branch since Congress is granted the authority to override an impoundment.

Nevertheless impoundment should remain a justiciable issue. The Act explicitly does not ratify or approve "any impoundment heretofore . . . executed or approved by the President or any other Federal officer or employees . . . ." H. R. REP. NO. 1101, 93d Cong., 2d Sess. 40, at §1001 (2) (1974). Further the Act does not affect "in any way the claims . . .of any party

(cont'd)

B. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT BAR REVIEW AS A MATTER COMMITTED TO AGENCY DISCRETION.

The Administrator contends the APA precludes judicial review of his refusal to allot since the agency action at issue is a matter committed to agency discretion. Brief for Petitioner at 41-43. The Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), clarified the provision for preclusion of judicial review expressed in 5 U.S.C. §701 (a). This section was characterized as "very narrow" and limited in application to "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " 401 U.S. at 410. In determining whether agency actions were reviewable, the Court in *Overton Park* looked to the statute to see if it contained definite standards for the agency head. The Court found reviewable the statute allowing the Secretary to approve a project utilizing public parklands

[21] (cont'd)
to litigation concerning any impoundment . . . ." *Id* §1001 (3). Additionally, the Act in no way supercedes any mandatory budgetary provisions, *id.* §1001 (4), and consequently federal courts clearly continue to have jurisdiction to enforce such ministerial actions.

Senator Ervin pointed out the import of the Act on impoundment litigation on the day of Senate passage:

> The Comptroller General will be granted authority to sue in the Federal [*sic*] District Court for the District of Columbia to enforce the provisions of the title . . . . This authority is not intended to infringe upon the right of any other party to initiate litigation . . . .
>
> A disclaimer section directs that nothing in the impoundment title should be construed as ratifying or approving any past or present impoundment, affecting the claims or defenses of any party to litigation concerning any impoundment, or asserting or conceding the constitutional powers or limitations of either the Congress or the President. The disclaimer also disavows any intention by Congress to supercede any law which requires the mandatory obligation of budget authority, since several such statutes have been enacted in response to the wholesale impoundment of funds appropriated for specific programs.

120 CONG. REC. S11222 (daily ed. June 21, 1974).

only if there was no "feasible and prudent alternative." 401 U.S. at 411. The standards in the Water Pollution Control Act allotment provision are far more explicit regarding allotment than the statute in the *Overton* case. The mandatory nature of the Water Pollution Control Act needs no further description here. The duty of the Administrator in allotment was clearly ministerial. The overall logic, specific language, and legislative history of the Act admits of no other interpretation than that allotment is a mandatory duty.

The Administrator alleges that the allotment phase of the Water Pollution Control Act "does not announce any specific precepts that are to guide the President in determining allottments [*sic*]." Brief for Petitioner at 43. However, in fact, the Act announces a very specific standard -- mandatory allotment. There are no detailed standards since allotment is ministerial. Detailed standards regarding approval appear at the obligation phase since that is where discretion is exercised and explicit standards are necessary.

The Water Pollution Control Act contains an explicit directive to allot. There is no latitude for what Petitioner describes as questions of judgement requiring close analysis and delicate choices. Brief for Petitioner at 42-43. Allotment is not an act committed to agency discretion. Consequently, the APA presents no bar to reviewability.

CONCLUSION

The Administrator failed to comply with a statutory requirement of the Water Pollution Control Act by failing to allot six billion dollars authorized by Congress. Plain meaning, legislative history and the overall structure of the Act demonstrate the allotment of full sums is mandatory. Moreover, the issue before the Court is justiciable and not barred by the doctrines of sovereign immunity or political question.

For the reasons stated herein, the Center for Governmental Responsibility urges this Court to affirm the judgement of the Court of Appeals for the District of Columbia and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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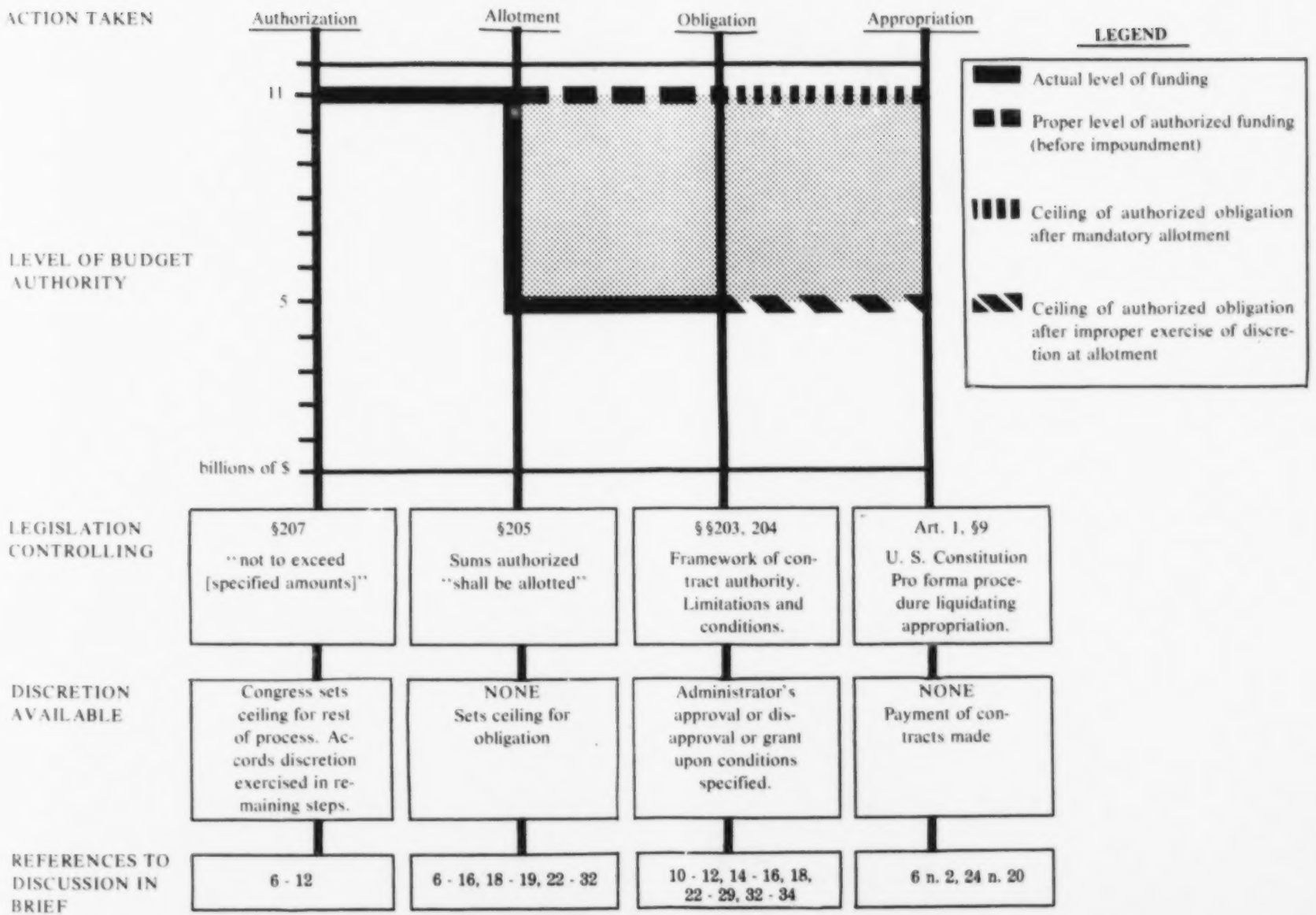
APPENDIX

METHOD OF EXPENDITURE IN THE WATER POLLUTION CONTROL ACT



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